

12-9-2019

## General Assembly in Review 2019

Follow this and additional works at: <https://scholarship.richmond.edu/pilr>



Part of the [Public Law and Legal Theory Commons](#)

---

### Recommended Citation

*General Assembly in Review 2019*, 23 RICH. PUB. INT. L. REV. ().

Available at: <https://scholarship.richmond.edu/pilr/vol23/iss1/1>

This Article is brought to you for free and open access by the Law School Journals at UR Scholarship Repository. It has been accepted for inclusion in Richmond Public Interest Law Review by an authorized editor of UR Scholarship Repository. For more information, please contact [scholarshiprepository@richmond.edu](mailto:scholarshiprepository@richmond.edu).

UNIVERSITY *of* RICHMOND  
PUBLIC INTEREST  
LAW REVIEW

2019



Vol. 23 No. 1

GENERAL ASSEMBLY IN REVIEW 2019

Letter From The Editor  
*By Elizabeth A. Ritchie*

ARTICLES

That Was The Year That Was:  
The 2019 Virginia General Assembly Session in Review  
*By Kenneth S. Anderson*

Where You Stand Depends On Where They Sit:  
Executive Crisis And Legislative Leadership In Virginia General Assembly  
*By Daniel J. Palazzolo and Thomas H. Little*

Preparing For The Next Decade:  
Evaluating The Potential Redistricting Commission In Virginia  
*By Katherine R. Schroth*

COMMENTS

“THC-You Later!” Analyzing Marijuana Prosecutions in  
Light of the Federal Farm Bill  
*By Jacqueline M. Cipolla*

---

UNIVERSITY of RICHMOND

---

# PUBLIC INTEREST LAW REVIEW

---

2019

VOLUME XXIII

2020

---

LIZZY RITCHIE  
*Editor-In-Chief*

M. RANDELL SCISM  
*Executive Editor*

SAHBA SARAVI  
*Managing Editor*

MARINA BATALIAS  
*Senior Manuscript Editor*

RACHEL CAMPBELL  
*Communications Editor*

KENNETH ANDERSON  
*General Assembly Editor*

KIM SIMMONS  
CAITLIN YUHAS  
*Lead Articles Editors*

ERICA REBUSSINI  
*Notes & Comments Editor*

CHRISTOPHER AN  
*Publications & Online Editor*

JACKIE CIPOLLA  
*Symposium Editor*

ALTA VISCOMI  
*Blog & Social Media Editor*

*Manuscript Editors*

NICOLE GIBSON

PETE JOHNSON

TERRI MORRIS

AISHA AH REED

*Senior Staff*

EDWARD LEBAR

REBECCA SCHULTZ

*Staff*

PARKER ALLEN  
SIDNEY BALMAN  
BRIANNE DONOVAN  
SAM GALINA  
TYLER MOSES  
JAMES ROSSON  
MIKE STEHLIN  
KRISTEN TOLBERT

JACOB ALEXANDER  
MITCHELL BEEBE  
SOGAND FALAHATPOUR  
CHANDLER HUFFER  
GREGORY PACKER  
OLIVIA SEKSINSKY  
LINDSEY SWEETGALL-BROCK  
SAMANTHA VAN WINTER  
JULIA ZIEGLER

EUDORA ARTHUR  
RILEY CYR  
ALYSSA FETTEROLF  
JULIANNA MEELY  
CHRISTOPHER ROBERSON  
SAM SHAFFER  
SAMANTHA TEETS  
CARLY WRIGHT

W. CLARK WILLIAMS, JR.  
*Faculty Advisor*

---

INFORMATION ABOUT THE  
*RICHMOND PUBLIC INTEREST LAW REVIEW*

The *Richmond Public Interest Law Review* is published quarterly by the University of Richmond School of Law. Questions, comments, and suggestions regarding the content of this journal are welcomed at:

University of Richmond School of Law  
28 Westhampton Way<sup>[L]</sup><sub>[SEP]</sub>  
University of Richmond, Virginia 23173  
(804) 289-8212  
<http://scholarship.richmond.edu/pilr/>

EDITORIAL POLICY:

The *Richmond Public Interest Law Review* seeks to preserve the author's writing style when editing articles selected for publication. As part of the ongoing relationship between the *Richmond Public Interest Law Review* and its authors, each author is given the opportunity to review his or her article prior to its publication.

SUBMISSIONS:

The *Richmond Public Interest Law Review* invites the submission of unsolicited articles, essays, comments, and notes throughout the year on a variety of topics. Manuscripts should include the author's biographical information either in text or in an accompanying résumé or curriculum vitae. Manuscripts submitted in a printed format will not be returned unless specifically requested and accompanied with proper postage.

Manuscripts may be sent in printed form to the *Richmond Public Interest Law Review* at the above address or by electronic mail at [pilr@richmond.edu](mailto:pilr@richmond.edu).

#### SUBSCRIPTIONS:

Subscription inquiries may be addressed to the Managing Editor of the *Richmond Public Interest Law Review* at the address listed above.

#### COPYRIGHT:

All articles copyright © 2019 by the *Richmond Public Interest Law Review*, unless noted otherwise. Articles herein may be duplicated for classroom use, provided that (1) each copy is distributed at or below cost, (2) the *Richmond Public Interest Law Review* is notified of such use, (3) proper notice of copyright is affixed to each copy, and (4) the author and the *Richmond Public Interest Law Review* are identified on each copy.

#### CITATIONS:

The text and citations of the *Richmond Public Interest Law Review* conform to *The Bluebook: A Uniform System of Citation* (20th ed. 2015).<sup>[L]  
[SEP]</sup>

Cite as: \_\_ RICH. PUB. INT. L. REV. \_\_

OFFICERS OF INSTRUCTION AND ADMINISTRATION  
UNIVERSITY OF RICHMOND  
SCHOOL OF LAW

ADMINISTRATION

Ronald Andrew Crutcher ..... President of the University of Richmond  
Wendy C. Perdue, B.A., J.D. .... Dean, Professor of Law  
Jessica Erickson, B.A., J.D. .... Associate Dean for Faculty Development,  
Professor of Law  
Su Jin Hong, B.A., J.D. .... Director of International Programs,  
Adjunct Professor of Legal Education and Culture  
Janet D. Hutchinson, B.S., J.D. .... Associate Dean of Career Services  
John F. Preis, B.S., J.D. .... Associate Dean for Academic Affairs,  
Professor of Law  
Roger V. Skalbeck, B.A., M.L.I.S., J.D. .... Associate Dean for Library and  
Information Services, Associate Professor of Law  
Alex Sklut, B.B.A., J.D. .... Associate Dean of Students  
Michelle Heck, B.S., M.A. .... Associate Dean of Admissions

FACULTY

Azizah Y. al-Hibri, B.A., Ph. D., J.D. .... Professor of Law, Emeritus  
Stephen Allred, B.A., M.P.A., J.D., Ed.D. .... Professor of Law  
Ronald J. Bacigal, B.S., LL.B. .... Professor of Law, Emeritus  
W. Wade Berryhill, B.S., J.D., LL.M. .... Professor of Law, Emeritus  
Carol N. Brown, A.B., LL.M, J.D. .... Professor of Law  
W. Hamilton Bryson, B.A., LL.B., LL.M., Ph.D., LL.D. .... Professor of Law  
Jud Campbell, B.A., M.Sc., J.D. .... Associate Professor of Law  
Tara L. Casey, B.A., J.D. .... Director, Carrico Center for Pro Bono Service  
Dale Margolin Cecka, B.A., J.D. .... Clinical Professor of Law  
Director, Family Law Clinic  
Henry L. Chambers, B.A., J.D. .... Professor of Law  
Timothy L. Coggins, B.A., M.S., J.D. .... Professor of Law, Emeritus  
Erin Collins, B.A., J.D. .... Assistant Professor of Law  
Christopher Corts, B.J., J.D., B.A., M.A. .... Assistant Professor of Legal Writing  
Christopher A. Cotropia, B.S., J.D. .... Director, Intellectual Property Institute  
Professor of Law  
Rebecca Crootof, B.A., J.D. .... Associate Dean of Students  
Ashley R. Dobbs, B.A., J.D. .... Director, Intellectual Property and  
Transactional Law Clinic  
John G. Douglas, B.A., J.D. .... Professor of Law  
Joel B. Eisen, B.S., J.D. .... Professor of Law

David G. Epstein, B.A., LL.M, LL.B. ....	Allen Professor of Law
Jessica M. Erickson, B.A., J.D. ....	Professor of Law
David Frisch, B.S., J.D., LL.M.....	Professor of Law
James Gibson, B.A., J.D.....	Professor of Law
Chiara Giorgetti, J.D. (Laurea), M.Sc., LL.M, J.S.D. ....	Associate Professor of Law
	Faculty Director, LL.M. Program
Meredith Johnson Harbach, B.A., J.D. ....	Associate Professor of Law
Mary L. Heen, B.A., M.A.T., J.D., LL.M. ....	Professor of Law, Emeritus
Ann C. Hodges, B.S., M.A., J.D.....	Professor of Law, Emeritus
Hayes R. Holderness, B.A., J.D., LL.M. ....	Assistant Professor of Law
Margaret E. Ivey, B.A., J.D. ....	Director, Clinical Placement Program
John Paul Jones, B.A., J.D., LL.M. ....	Professor of Law, Emeritus
Corinna Barrett Lain, B.A., J.D.....	Roberts & Moore Professor of Law
Kurt T. Lash, B.A., J.D.....	Robins Distinguished Chair in Law
Da Lin, A.B., S.M., J.D. ....	Assistant Professor of Law
Julie Ellen McConnell, B.A., J.D. ....	Director, Children's Defense Clinic
Gary L. McDowell, B.A., M.A., A.M., Ph.D. ....	Professor, Emeritus
Andre A. Moenssens, J.D., LL.M.....	Professor of Law, Emeritus
Shari Motro, B.A., J.D.....	Professor of Law
Daniel T. Murphy, B.A., J.D., LL.M. ....	Professor of Law, Emeritus
Luke Norris, B.A., M.Sc., J.D. ....	Assistant Professor of Law
Kristen Jakobsen Osenga, J.D., M.S., B.S.E. ....	Professor of Law
John R. Pagan, A.B., M.Lit., J.D., D.Phil.....	Professor, Emeritus
Emmeline Paulette Reeves, B.A., J.D. ....	Director, Academic Skills Program
Kimberly J. Robinson, B.A, J.D. ....	Professor of Law
Noah M. Sachs, B.A., J.D, M.P.A. ....	Professor of Law
Doron Samuel-Siegel, B.A., J.D.....	Assistant Professor of Legal Writing
Daniel Schaffa, B.A., M.Acc., M.A., J.D., M.S. ....	Assistant Professor
Tamar R. Schwartz, B.A., J.D. ....	Assistant Professor of Legal Writing
Andrew B. Spalding, B.A., J.D., Ph.D. ....	Professor of Law
Fallon Speaker, B.A., J.D. ....	Assistant Clinical Professor of Law
Jonathan K. Stubbs, B.A., B.A., J.D., LL.M., M.T.S. ....	Professor of Law
Rachel Juhas Suddarth, B.A., J.D.....	Assistant Professor of Legal Writing
Allison Anna Tait, B.A., Ph.D., J.D., LL.M. ....	Assistant Professor of Law
Mary Kelly Tate, B.A., J.D.....	Director, Richmond Institute for Actual Innocence
Carl W. Tobias, B.A., LL.B. ....	Williams Professor of Law
Adrienne E. Volenik, B.A., J.D. ....	Clinical Professor of Law
	Director, Education Rights Clinic
Margaret Ann B. Walker, B.A., J.D. ....	Assistant Professor
	Academic Success Program
Kevin C. Walsh, A.B., M.A., J.D. ....	Associate Professor of Law
Laura A. Webb, B.A., J.D. ....	Assistant Professor of Legal Writing
W. Clark Williams, Jr., B.A., J.D. ....	Professor of Law
Kevin Woodson, B.A., J.D., M.A., Ph.D.....	Professor of Law

## LIBRARY FACULTY

Paul M. Birch, B.A., M.A.L.S., J.D.....Computer Services Librarian  
Alexis Fetzter, B.A., J.D., M.L.I.S. .... Reference and Research  
Services Librarian  
Andrew Frank, B.A., M.L.S. .... Access Services Librarian  
Molly Lentz-Meyer, B.A., M.A., M.L.I.S., J.D. Digital and Archival Collections Li-  
brarian  
Joyce Manna Janto, B.S., M.L.S., J.D .....Deputy Director  
Kathleen J. Klepfer, B.A., M.L.S., J.D. .... Reference and Research  
Services Librarian  
Mei Kiu Lo, B.S., M.L.S, C.A.S. .... Catalog/Systems Librarian  
Maureen Moran, B.A., M.S.L.S., J.D. .... Reference and Research  
Services Librarian  
Amy L. O'Connor, B.A., M.L.S..... Technical Services/Digital Resources Librarian  
Elizabeth Schiller B.A., M.A., M.S.L.S., J.D. .... Reference and Research Services  
Librarian

## ADJUNCT FACULTY

Farhad Aghdami, B.A., J.D., LL.M.....Adjunct Professor of Law  
Katherine B. Bain, B.A., J.D. ....Adjunct Professor of Law  
Edward D. Barnes, B.A., J.D.....Adjunct Professor of Law  
William J. Benos, LL.B., J.D. ....Adjunct Professor of Law  
David E. Boelzner, B.A., M.A., J.D., LL.M.....Adjunct Professor of Law  
Corey Booker, B.A., M.S., J.D.....Adjunct Professor of Law  
Genoveva Border, J.D, LL.M. ....Adjunct Professor of Law  
Claudia Brand, J.D. ....Adjunct Professor of Law  
The Hon. Lynn S. Brice, B.A., M.S.W., J.D. ....Adjunct Professor of Law  
Craig M. Burshem, B.S., J.D.....Adjunct Professor of Law  
Jack W. Burtch, Jr., B.A., J.D. ....Adjunct Professor of Law  
Harris D. Butler, III, B.A., J.D. ....Adjunct Professor of Law  
Sean Byrne, B.A., J.D. ....Adjunct Professor of Law  
The Hon. Richard Campbell, B.A., J.D. ....Adjunct Professor of Law  
Brian Cannon, B.A., J.D.....Adjunct Professor of Law  
Latoya Capers, B.S., J.D.....Adjunct Professor of Law  
Heather Caputo, B.A., J.D. ....Adjunct Professor of Law  
Claire G. Cardwell, B.A., J.D.....Adjunct Professor of Law  
Thomas Chaffé, B.A., J.D. ....Adjunct Professor of Law  
Christopher J. Collins, B.A., J.D. ....Adjunct Professor of Law  
Nancy D. Cook, B.S., J.D.....Adjunct Professor of Law  
James C. Cosby, B.A., J.D. ....Adjunct Professor of Law  
Ashley T. Davis, B.A., J.D. ....Adjunct Professor of Law  
The Hon. Marla Graff Decker, B.A., J.D. ....Adjunct Professor of Law  
Peter Duffey, B.A., J.D.....Adjunct Professor of Law  
Jason Eakes, B.A., J.D.....Adjunct Professor of Law



The Hon. Joseph J. Ellis, B.A., J.D. ....	Adjunct Professor of Law
Morna P. Ellis, M.Ed., J.D. ....	Adjunct Professor of Law
Andra S. Erard, B.A., J.D. ....	Adjunct Professor of Law
Stephen M. Faraci, Sr., B.A., J.D. ....	Adjunct Professor of Law
Catherine French, B.A., J.D. ....	Adjunct Professor of Law
Lisa Frisina, B.B.A., J.D. ....	Adjunct Professor of Law
Frederick R. Gerson, B.A., J.D. ....	Adjunct Professor of Law
Michael Gill, B.A., J.D. ....	Adjunct Professor of Law
Paul G. Gill, B.A., J.D. ....	Adjunct Professor of Law
Michael L. Goodman, B.A., J.D. ....	Adjunct Professor of Law
Carolyn V. Grady, B.A., J.D. ....	Adjunct Professor of Law
Elizabeth Griffin, B.A., J.D. ....	Adjunct Professor of Law
Timothy H. Guare, B.A., J.D. ....	Adjunct Professor of Law
Elizabeth Wilson Hanes, B.A., J.D. ....	Adjunct Professor of Law
Michael N. Herring, B.A., J.D. ....	Adjunct Professor of Law
Vernon E. Inge, B.A., J.D. ....	Adjunct Professor of Law
John C. Ivins, Jr., B.A., J.D. ....	Adjunct Professor of Law
David J. Johnson, B.A., J.D. ....	Adjunct Professor of Law
The Hon. Randall G. Johnson, Jr., B.A., J.D. ....	Adjunct Professor of Law
Phyllis C. Katz, B.A., M.A., J.D. ....	Adjunct Professor of Law
Elizabeth Laliberte, B.A., J.D. ....	Adjunct Professor of Law
Mary Elizabeth Langer, B.A., J.D. ....	Adjunct Professor of Law
Mary E. Maguire, B.A., J.D. ....	Adjunct Professor of Law
Bruce Matson, B.A., J.D. ....	Adjunct Professor of Law
Isaac McBeth, B.A., J.D. ....	Adjunct Professor of Law
James M. McCauley, B.A., J.D. ....	Adjunct Professor of Law
Kathleen M. McCauley, B.A., J.D. ....	Adjunct Professor of Law
James V. Meath, B.A., M.A.U., J.D. ....	Adjunct Professor of Law
Leigh Melton, B.A., J.D. ....	Adjunct Professor of Law
The Hon. Stephanie E. Merritt, B.A., J.D. ....	Adjunct Professor of Law
Stephen Miller, B.A., J.D. ....	Adjunct Professor of Law
Traci B. Miller, B.A., J.D. ....	Adjunct Professor of Law
Duncan Minton, Jr., B.A., J.D. ....	Adjunct Professor of Law
Dale G. Mullen, B.A., B.S., J.D. ....	Adjunct Professor of Law
Jennifer Nesbitt, B.A., J.D. ....	Adjunct Professor of Law
The Hon. David J. Novak, B.S., J.D. ....	Adjunct Professor of Law
Jay Oakey, A.B., J.D. ....	Adjunct Professor of Law
Laurence V. Parker, B.A., M.B.A., J.D. ....	Adjunct Professor of Law
Robert Partin, B.A., J.D. ....	Adjunct Professor of Law
The Hon. Jayne A. Pemberton, B.A., M.A., J.D. ....	Adjunct Professor of Law
James Phillips, Ph.D. ....	Adjunct Professor of Law
Michael Pillow, B.A., J.D. ....	Adjunct Professor of Law
Brody Reid, B.A., J.D. ....	Adjunct Professor of Law
Jacqueline M. Reiner, B.A., J.D. ....	Adjunct Professor of Law
Elizabeth E. Riopelle, B.A., J.D. ....	Adjunct Professor of Law
John V. Robinson, B.A., B.L., J.D. ....	Adjunct Professor of Law
Thomas P. Rohman, B.A., J.D. ....	Adjunct Professor of Law
Stephen Romine, B.A., J.D., M.B.A. ....	Adjunct Professor of Law
Marshall Ross, B.A., J.D. ....	Adjunct Professor of Law
Randy B. Rowlett, B.A., J.D. ....	Adjunct Professor of Law

Mark E. Rubin, B.A., J.D. ....	Adjunct Professor of Law
Craig Sampson, B.A., J.D.....	Adjunct Professor of Law
Connelia Ross Savage, B.S., J.D. ....	Adjunct Professor of Law
Cullen Seltzer, B.A., J.D. ....	Adjunct Professor of Law
Charles K. Seyfarth, B.A., J.D. ....	Adjunct Professor of Law
Blackwell N. Shelley, Jr., B.A., J.D. ....	Adjunct Professor of Law
The Hon. Beverly W. Snukals, B.A., J.D. ....	Adjunct Professor of Law
John Steele, B.A., J.D.....	Adjunct Professor of Law
John H. Thomas, B.A., J.D.....	Adjunct Professor of Law
The Hon. Tracey W. J. Thorne-Begland, B.A., J.D.....	Adjunct Professor of Law
Ian D. Titley, B.S., J.D. ....	Adjunct Professor of Law
Samuel T. Towell, B.S., J.D. ....	Adjunct Professor of Law
John Tucker, B.A., J.D. ....	Adjunct Professor of Law
Robert J. Wagner, B.A., J.D. ....	Adjunct Professor of Law
Michelle Welch, B.A., J.D. ....	Adjunct Professor of Law
Thomas M. Wolf, B.A., J.D. ....	Adjunct Professor of Law

CONTENTS

LETTER FROM THE EDITOR..... IX

*Elizabeth A. Ritchie*

ARTICLES

THAT WAS THE YEAR THAT WAS: THE 2019 VIRGINIA GENERAL  
ASSEMBLY SESSION IN REVIEW ..... 1

*Kenneth S. Anderson*

WHERE YOU STAND DEPENDS ON WHERE THEY SIT:  
EXECUTIVE CRISIS AND LEGISLATIVE LEADERSHIP IN VIRGINIA  
GENERAL ASSEMBLY ..... 23

*Daniel J. Palazzolo and Thomas H. Little*

PREPARING FOR THE NEXT DECADE:  
EVALUATING THE POTENTIAL REDISTRICTING COMMISSION IN VIRGINIA  
..... 57

*Katherine R. Schroth*

COMMENTS

“THC-YOU LATER!” ANALYZING MARIJUANA PROSECUTIONS IN  
LIGHT OF THE FEDERAL FARM BILL ..... 83

*Jacqueline M. Cipolla*

## LETTER FROM THE EDITOR

*Elizabeth A. Ritchie*

Dear Readers,

On behalf of the *Richmond Public Interest Law Review*, it is my honor to present the first issue of Volume XXIII. This is the 2019 edition of our *General Assembly in Review*.

In this issue, authors address matters that impacted the 2019 General Assembly session and will continue to impact the 2019 and 2020 General Assembly sessions in Virginia. This issue begins with a survey piece that evaluates the 2019 Virginia General Assembly session in light of the scandals involving Virginia's three highest elected officials. Next, this issue explores the scandals that surrounded the Governor, Lieutenant Governor, and Attorney General, and the legislative response in Virginia. Further, this issue examines the legal battle over racial gerrymandering and district maps. Finally, this issue concludes with a comment that assesses the Virginia Department of Forensic Science memorandum advising that current marijuana field test kits that law enforcement agencies use to test green leafy plant material cannot distinguish between marijuana and industrial hemp, and the impact this will have on future marijuana prosecutions.

Publication of this issue would not be possible without the hard work and diligent effort of our General Assembly Editor, Kenneth Anderson, who wrote this issue's survey piece. We also owe a special thanks to our other authors: Dr. Dan Palazzolo, Dr. Thom Little, Kassie Schroth, and Jackie Cipolla. On behalf of the *Richmond Public Interest Law Review*, we sincerely hope this issue offers insight regarding some of the most important legislative matters in the Commonwealth of Virginia.

Sincerely,

Elizabeth A. Ritchie

*Editor-in-Chief*

THAT WAS THE YEAR THAT WAS\*:  
THE 2019 VIRGINIA GENERAL ASSEMBLY SESSION IN REVIEW

*Kenneth S. Anderson\**

---

\* Author's Note: The title of this article is a play on the title of the pioneering British television show "That Was the Week That Was," a program dedicated to chronicling the political news of its era from a dually serious and satirical position. While the program's contributions are noteworthy, this article leaves the satire entirely to the pundits.

\* J.D. Candidate, Class of 2020 at the University of Richmond School of Law. Kenneth Anderson serves as the General Assembly Editor for the *Public Interest Law Review*. Before attending law school, he interned as a Congressional Black Caucus Foundation Intern in the Washington, D.C. office of Rep. Mia Love. Ken graduated from the University of Richmond with a B.A. in Leadership Studies and American Studies.

## ABSTRACT

*The legislative agenda proposed and adopted marked the 2019 General Assembly session as much as the controversy resulting from Virginia's top-three highest elected officials' actions. On February 1, 2019, a 1984 image in Governor Ralph Northam's medical school yearbook page surfaced of a man in blackface standing next to a man in Ku Klux Klan garb. Within twenty-four hours of that scandal, Lieutenant Governor Justin Fairfax was accused of sexual assault, and in the following days, accused of a second assault. The revelation that Attorney General Mark Herring also admitted to appearing in blackface as a college student further complicated the incident. These three incidents created a tense atmosphere on Richmond's Capitol Hill, prompting national attention and calls for the officials' resignations. The scandal overshadowed the latter half of the General Assembly session. However, during the forty-seven-day session, lawmakers converged on Richmond, and debated and passed legislation on key issues affecting the Commonwealth. The General Assembly passed laws further regulating tobacco consumption by minors and insurance coverage for those with autism while establishing a statewide Redistricting Commission. Notably, the General Assembly did not ratify the Equal Rights Amendment and did not pass any significant gun-related legislation in its regular or special sessions in July.*

## INTRODUCTION

On January 9, lawmakers ushered in the 2019 session of the Virginia General Assembly.<sup>1</sup> This year's session was historic.<sup>2</sup> With the drop of the gavel by House of Delegates Speaker, Kirk Cox (R-Colonial Heights, Chesterfield), Virginia's joint legislative bodies commemorated 400 years of representative democracy in the Western Hemisphere.<sup>3</sup> Virginia is home to the nation's and the hemisphere's oldest representative government, which began in 1619 as the Virginia House of Burgesses in Jamestown.<sup>4</sup> In 400 years of government, the General Assembly has survived war, depression, and exhibited peaceful transfers of political power longer than many nations in the

<sup>1</sup> *Key Dates for 2019 General Assembly*, VA. ASS'N COUNTIES (Jan. 9, 2019), <https://www.vaco.org/key-dates-for-2019-general-assembly-session>.

<sup>2</sup> See Marie Albiges & Dave Ress, *From 1619 to 2019: Virginia Lawmakers Back in Session, 4 Centuries After First Meeting*, DAILY PRESS (Jan. 9, 2019), <https://www.dailypress.com/news/virginia/dp-nws-general-assembly-session-opening-20190107-story.html>.

<sup>3</sup> *Id.*

<sup>4</sup> *The House of Burgesses*, U.S. HIST., <http://www.ushistory.org/us/2f.asp> (last visited Sept. 18, 2019).

2019]

“THAT WAS THE YEAR THAT WAS”

3

world.<sup>5</sup> In 2019, Republicans held a majority of two seats in both the House of Delegates and the Virginia Senate.<sup>6</sup> Before the session began, both Democrats and Republicans outlined their priorities for the session.<sup>7</sup> Left on the legislative table from last session were questions surrounding education and gun control,<sup>8</sup> among other issues.

This article will provide a survey of notable moments and pieces of legislation passed during this year’s General Assembly session and the July 2019 special session. Part I will discuss the scandal that embroiled Virginia’s executive branch, and Part II will discuss various aspects of the legislative agenda for the past year. Next, Part III will analyze triumphs and defeats within the legislature, highlighting political victories for Democrats and Republicans. Part IV will then list some of the Governor’s vetoes. Finally, Part V will look forward to the next session and briefly discuss issues that will likely be considered within the coming years. This article is not meant to be a comprehensive analysis of the last session, but is rather meant to provide a glimpse at some of the most interesting or important issues discussed and deliberated over the year.

## I. THE CONTROVERSY

The 2019 session, while productive in a legislative sense, gained national attention for three major controversies surrounding Virginia’s three highest elected officials.<sup>9</sup> Some may argue that the session’s most significant moment stemmed not from the bills discussed, but from the actions of Virginia’s top officials.<sup>10</sup> No legislative session of any governmental body

<sup>5</sup> See *Four Hundred Years Ago, A Nation Began to Bloom in Jamestown*, DAILY PRESS (July 27, 2019), <https://www.dailypress.com/opinion/dp-edt-jamestown-400-years-0728-story.html>.

<sup>6</sup> *Virginia Primary Election Results*, WASH. POST (June 12, 2019), <https://www.washingtonpost.com/election-results/virginia/>.

<sup>7</sup> See Albiges & Ress, *supra* note 2 (explaining that both parties prioritized Medicaid, tax breaks and criminal justice reform, but Democrats prioritized education and water quality, while Republicans prioritized tobacco taxes).

<sup>8</sup> See Justin Mattingly, *How Education Bills Fared this Virginia General Assembly Session*, RICH. TIMES-DISPATCH (Mar. 17, 2018), [https://www.richmond.com/news/virginia/government-politics/how-education-bills-fared-this-virginia-general-assembly-session/article\\_2f000f63-dfa2-5f61-8e82-50404df71d8a.html](https://www.richmond.com/news/virginia/government-politics/how-education-bills-fared-this-virginia-general-assembly-session/article_2f000f63-dfa2-5f61-8e82-50404df71d8a.html); Gregory S. Schneider, *Gun Debate Ends Abruptly in Virginia as GOP-Controlled Legislature Adjourns After 90 Minutes*, WASH. POST (July 9, 2019), [https://www.washingtonpost.com/local/virginia-politics/gun-debate-hits-full-throttle-in-richmond-as-legislature-convenes/2019/07/09/caf20590-a1d4-11e9-bd56-eac6bb02d01d\\_story.html](https://www.washingtonpost.com/local/virginia-politics/gun-debate-hits-full-throttle-in-richmond-as-legislature-convenes/2019/07/09/caf20590-a1d4-11e9-bd56-eac6bb02d01d_story.html).

<sup>9</sup> Veronica Rocha, *Virginia Politics in Chaos*, CNN (Feb. 7, 2019), <https://www.cnn.com/politics/live-news/virginia-politics-chaos-2019/index.html>.

<sup>10</sup> See Alan Blinder, *Virginia Political Crisis Grows for Democrats and Republicans*, N.Y. TIMES (Feb. 7, 2019), <https://www.nytimes.com/2019/02/07/us/virginia-governor-scandal.html> (focusing on the personal conduct of Virginia’s top officials as the “political tumult” engulfing the session, rather than focusing on legislation).



concludes without controversy.<sup>11</sup> Seemingly, government and politics seem to attract and often encourage it. In early February, midway through the General Assembly session, the unexpected revelation of a damning photo in Governor Ralph Northam's 1984 medical school yearbook captivated the national attention.<sup>12</sup> The photo on the Governor's yearbook page included a picture of a man dressed in blackface with his arm over the shoulder of a student dressed in a Ku Klux Klan robe.<sup>13</sup>

Just two years after white supremacists marched in Charlottesville to protest the removal of Confederate monuments, which resulted in the death of a young woman and two state troopers,<sup>14</sup> Virginia was healing from confronting its racial past while attempting to reform its complicated national image. Northam, as a gubernatorial candidate, campaigned against racial hatred and for reforming the Commonwealth's image following the tragedy in Charlottesville.<sup>15</sup> On his campaign trail, Northam even stated that Virginia should take a strong stance against white supremacists, stating: "we [as Virginians] need to make sure that they [white supremacists] know that they are not welcome here in Virginia, and that we don't condone hatred and bigotry."<sup>16</sup> Within less than a year, many Virginia residents perceived Northam not as a product of Virginia's progress, but as a vestige of the *ancien régime* of Jim Crow Virginia.<sup>17</sup> This incident, once again, placed the Commonwealth and its chief executive in the national spotlight for a less-than-savory reason.

<sup>11</sup> See, e.g., Zac Anderson, *Legislature 2018: Controversial Issues Top Agenda*, LEDGER (Jan. 6, 2018), <https://www.theledger.com/news/20180106/legislature-2018-controversial-issues-top-agenda/1> (detailing Florida's controversial 2018 legislative session); see also Paul Egan, *The Most Controversial Bills in Michigan's Lame Duck Legislature*, DET. FREE PRESS (Dec. 21, 2018), <https://www.freep.com/story/news/local/michigan/2018/12/04/michigan-legislature-bills-lame-duck-session/2162560002/> (explaining Michigan's fraught 2018 lame duck legislature); see also Brian Lyman, *Alabama Legislature 2019: What Passed; What Didn't, What Remains*, MONTGOMERY ADVISOR (May 31, 2019), <https://www.montgomeryadvertiser.com/story/news/2019/05/31/alabama-legislature-2019-what-passed-what-didnt-what-remains/1308411001/> (describing Alabama's 2019 regular sessions as "fiercely controversial").

<sup>12</sup> Caroline Kelly, *Virginia Governor Apologizes for 'Racist and Offensive' Costume in Photo Showing People in Blackface and KKK Garb*, CNN (Feb. 7, 2019), <https://www.cnn.com/2019/02/01/politics/northam-blackface-photo/index.html>.

<sup>13</sup> Laura Vozzella, Jim Morrison & Gregory S. Schneider, *Gov. Ralph Northam Admits He Was in 1984 Yearbook Photo Showing Figures in Blackface, KKK Hood*, WASH. POST (Feb. 1, 2019), [https://www.washingtonpost.com/local/virginia-politics/va-gov-northams-medical-school-yearbook-page-shows-men-in-blackface-klx-robe/2019/02/01/517a43ee-265f-11e9-90cd-dedb0c92dc17\\_story.html](https://www.washingtonpost.com/local/virginia-politics/va-gov-northams-medical-school-yearbook-page-shows-men-in-blackface-klx-robe/2019/02/01/517a43ee-265f-11e9-90cd-dedb0c92dc17_story.html).

<sup>14</sup> Kamala Kelkar, *Three Dead After White Nationalist Rally in Charlottesville*, PBS NEWS HOUR (Aug. 12, 2017), <https://www.pbs.org/newshour/amp/nation/state-emergency-charlottesville-va-fights-erupt-white-nationalist-rally>.

<sup>15</sup> See Emmy Freedman, *Northam Stops in Charlottesville, Discusses White Nationalist Rally*, NBC29 (Oct. 16, 2017), <https://www.nbc29.com/story/36548599/ralph-northam-comes-to-charlottesville-to-address-white-nationalist-rally>.

<sup>16</sup> *Id.*

<sup>17</sup> See Rhac L. Barnes, *The Troubling History Behind Ralph Northam's Blackface Klan Photo*, WASH. POST (Feb. 2, 2019), <https://www.washingtonpost.com/outlook/2019/02/02/troubling-history-behind-ralph-northams-blackface-klan-photo/>; Alan Blinder, *Was That Ralph Northam in Blackface? An Inquiry*

2019]

“THAT WAS THE YEAR THAT WAS”

5

First, Northam apologized, stating, “a website published a photograph of me from my 1984 medical school yearbook in a costume that is clearly racist and offensive. I am deeply sorry for the decision I made to appear as I did in this photo and for the hurt that decision caused then and now.”<sup>18</sup> Facing calls for his resignation, the next day, he appeared on television to apologize for his misdeeds.<sup>19</sup> At that press conference, the Governor explained the purpose of the photo and confessed that he participated on a separate occasion in a Michael Jackson revue, where he appeared in blackface in the early 1980s.<sup>20</sup> Northam’s wife subdued him as he attempted to replicate the moonwalk he performed some thirty years before, in an effort to lighten the mood.<sup>21</sup> Later in the press conference, Northam reneged his earlier account and explained that he was not in the photograph.<sup>22</sup> As Northam confronted the rancor of constituents, additional information came to light that revealed his college nickname at the Virginia Military Institute, “Coonman,” and his presence at other events, which were deemed racially-insensitive, as a young man.<sup>23</sup>

Within hours, constituents and national public figures alike, including Senators Tim Kaine and Mark Warner, and Congressman Bobby Scott, urged the Governor to resign.<sup>24</sup> Despite early calls for his resignation, Northam continues to serve the Commonwealth as Governor and has sought to redeem his statewide image by going on a “redemption tour” across the state, where he speaks to constituents about his behavior and Virginia’s tumultuous racial past.<sup>25</sup>

---

*Ends Without Answers*, N.Y. TIMES (May 22, 2019), <https://www.nytimes.com/2019/05/22/us/ralph-northam-blackface-photo.html>.

<sup>18</sup> Kelly, *supra* note 12.

<sup>19</sup> Tom Embury-Dennis, *Ralph Northam: Governor’s Wife Stops Him Doing ‘Inappropriate’ Moonwalk at Press Conference About Blackface Incident*, INDEP. (Feb. 4, 2019), <https://www.independent.co.uk/news/world/americas/us-politics/ralph-northam-blackface-photo-racist-moonwalk-michael-jackson-apology-virginia-governor-a8762181.html>.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Colby Hall, *Governor Northam Racist Yearbook Nickname: They Call Me ‘Coonman’*, MEDIAITE (Feb. 2, 2019), <https://www.mediaite.com/tv/governor-northam-explains-racist-yearbook-nickname-they-called-me-coonman/>.

<sup>23</sup> Tommy Lopez, *Gov. Northam’s VMI Yearbook Photo Lists Racist Slur as Nickname*, WSLS10 (Feb. 2, 2019), <https://www.wsls.com/news/virginia/gov-northams-vmi-yearbook-photo-lists-racial-slur-as-a-nickname>.

<sup>24</sup> Warner, Kaine, Scott Call On Northam to Resign, RICH. TIMES-DISPATCH (Feb. 2, 2019), [https://www.richmond.com/news/virginia/government-politics/warner-kaine-scott-call-on-northam-to-resign/article\\_f5e76755-3d0d-5133-b929-ee99ceedf4d2.html](https://www.richmond.com/news/virginia/government-politics/warner-kaine-scott-call-on-northam-to-resign/article_f5e76755-3d0d-5133-b929-ee99ceedf4d2.html).

<sup>25</sup> Whitney Evans, *Virginia’s Governor Is Going On An Apology Tour. For Some, It’s Too Little, Too Late*, NPR (Feb. 14, 2019), <https://www.npr.org/2019/02/14/694666825/northams-apology-tour-is-too-little-too-late-for-many-of-va-s-young-black-leader>.

The Virginia executive branch was dealt another blow when, within twenty-four hours, an article appeared accusing the Democratic Lieutenant Governor and President of the Virginia Senate, Justin Fairfax, of sexually assaulting a woman at the 2004 Democratic National Convention.<sup>26</sup> Upon the news of Northam's scandal, many speculated that Northam would resign and Fairfax would ascend to the governorship, becoming Virginia's second African American governor.<sup>27</sup> Lieutenant Governor Fairfax, a rising star within Virginia's Democratic Party, developed a rapport with constituents and the political class of Virginia in the years preceding the scandal.<sup>28</sup> Three days later, another woman came forward, alleging that the Lieutenant Governor sexually assaulted her.<sup>29</sup> With the second accusation against Fairfax and Governor Northam's insistence on not resigning, Democrats and Republicans in the General Assembly called for impeachment, causing the General Assembly to assess its own mechanisms for impeachment of Virginia executive officials.<sup>30</sup>

Amidst the controversy swirling around Northam and Fairfax, Virginia's third-highest elected official, Attorney General Mark Herring admitted that he, too, wore blackface at a party in 1980 as a college freshman.<sup>31</sup> Dressed as rapper Kurtis Blow, Herring donned blackface and a wig.<sup>32</sup> Herring called for the Governor to resign just days before, suggesting, "it is no longer possible for Governor Northam to lead our Commonwealth and it is time for him to step down."<sup>33</sup>

After almost five months since the break of the scandal, Virginia's Governor and Lieutenant Governor still serve in their positions.<sup>34</sup> In response

<sup>26</sup> See Trip Gabriel & Michael M. Grynbaum, *With Obscure Picture, Obscure Publication Plays Big Role in Virginia Politics*, N.Y. TIMES (Feb. 4, 2019), <https://www.nytimes.com/2019/02/04/us/politics/northam-fairfax-big-league-politics.html>; Campbell Robertson & Stephanie Saul, *The Political Ascent of Justin Fairfax, and the Disturbing Allegations That Might End It*, N.Y. TIMES (Feb. 12, 2019), <https://www.nytimes.com/2019/02/12/us/justin-fairfax-virginia.html>.

<sup>27</sup> Campbell Robertson & Stephanie Saul, *The Political Ascent of Justin Fairfax, and the Disturbing Allegations That Might End It*, N.Y. TIMES (Feb. 12, 2019), <https://www.nytimes.com/2019/02/12/us/justin-fairfax-virginia.html>.

<sup>28</sup> See *id.* (describing Fairfax's early popularity and promising political future).

<sup>29</sup> Jenna Portnoy et al., *Second Woman Accused Va. Lt. Gov. Justin Fairfax of Sexual Assault*, WASH. POST (Feb. 8, 2019), [https://www.washingtonpost.com/local/virginia-politics/second-woman-accuses-va-lt-gov-justin-fairfax-of-sexual-assault/2019/02/08/19e6bb6c-2bdf-11e9-b011-d8500644dc98\\_story.html](https://www.washingtonpost.com/local/virginia-politics/second-woman-accuses-va-lt-gov-justin-fairfax-of-sexual-assault/2019/02/08/19e6bb6c-2bdf-11e9-b011-d8500644dc98_story.html).

<sup>30</sup> *Id.*; Josh Voorhees, *Can Ralph Northam be Forced Out?*, SLATE (Feb. 4, 2019), <https://slate.com/news-and-politics/2019/02/northam-blackface-impeachment-constitution.html>.

<sup>31</sup> Dan Merica, *Virginia Attorney General Admits to Wearing Blackface at 1980 College Party*, CNN (Feb. 7, 2019), <https://www.cnn.com/2019/02/06/politics/virginia-attorney-general-blackface/index.html>.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Government*, VIRGINIA.GOV (Sept. 7, 2019), <https://www.virginia.gov/government/index.html#executive-branch>; Zach Budryk, *Virginia Governor's Approval Ratings Above Water 6 Months After*

2019]

“THAT WAS THE YEAR THAT WAS”

7

to potential criminal charges, Fairfax called for an independent investigation.<sup>35</sup> In the last days of this year’s regular session, the General Assembly debated holding public committee hearings to gain testimony from Fairfax and those who accused him of assault.<sup>36</sup> The scandal has since prompted a national conversation on the persistent presence of racism in modern history and the present day.<sup>37</sup> The unfortunate episode also caused a statewide constitutional conversation on the line of succession for the Virginia governorship.<sup>38</sup>

In early February, some Virginia Democrats braced themselves for possibly losing the three highest elected Democratic officials due to the scandal, and seeing the Republican Speaker of the House of Delegates, Kirk Cox, become Governor.<sup>39</sup> Under the Virginia Constitution, if the Lieutenant Governor or the Attorney General are unable to serve as Acting Governor, the Speaker of the House of Delegates would succeed as Governor.<sup>40</sup> During the chaos with the Virginia Democratic Party, Republican members also found themselves in precarious positions.<sup>41</sup> Images from Senate Majority Leader Tommy Norment’s (R-James City County) 1968 college yearbook from the Virginia Military Institute featured a host of images of students dressed in blackface and Confederate imagery.<sup>42</sup> Norment was associated with the controversy because he served as one of the editors for the yearbook.<sup>43</sup> Norment defended himself, citing the fact that he did not appear in or take any of the offensive photographs.<sup>44</sup>

---

*Blackface Scandal*, HILL (Aug. 26, 2019), <https://thehill.com/homenews/state-watch/458912-virginia-governors-approval-ratings-above-water-6-months-after-blackface>.

<sup>35</sup> Dean Mirshahi, *Fairfax Calls for Full Investigation into Sexual Assault Allegations*, WRIC (Feb. 9, 2019), <https://www.wric.com/news/fairfax-calls-for-full-investigation-into-sexual-assault-allegations/>.

<sup>36</sup> 2019 Virginia Legislative Session, BALLOTPEdia, [https://ballotpedia.org/2019\\_Virginia\\_legislative\\_session](https://ballotpedia.org/2019_Virginia_legislative_session) (last visited Sept. 14, 2019).

<sup>37</sup> Jon Ehrens, *The Backlash to Virginia’s Blackface Scandal Provides Insight into Americans Views on Racism*, WHYY (Feb. 13, 2019), <https://whyy.org/articles/the-backlash-to-virginias-blackface-scandal-provides-insight-into-americans-views-on-racism/>.

<sup>38</sup> See Eliana Block, *Who’s Next in the Line of Succession for Virginia’s Governor? Can You Be the 16th in Line?*, WUSA9 (Feb. 6, 2019), <https://www.wusa9.com/article/news/verify/verify-whos-next-in-the-line-of-succession-for-virginia-governor-can-you-be-16th-in-line/65-e13a8cca-4b37-4d5f-b07a-45361d43dac4>.

<sup>39</sup> See VA. CONST. art. V, § 16; Bill Barrow, *Virginia Dems Brace for 2020 Political Fallout from Scandal*, AP NEWS (Feb. 8, 2019), <https://www.apnews.com/5cddb1d53cc2141f6aa2eebe55bd4d146>.

<sup>40</sup> See VA. CONST. art. V, § 16.

<sup>41</sup> See Katherine Hafner, Elisha Sauers & Dave Ress, *Virginia Sen. Tommy Norment Was An Editor for VMI Yearbook Filled with Racist Photos and Slurs*, VIRGINIAN-PILOT (Feb. 7, 2019), [https://www.pilotonline.com/government/virginia/article\\_d4ce7700-2ae3-11e9-ace9-ff7814740140.html](https://www.pilotonline.com/government/virginia/article_d4ce7700-2ae3-11e9-ace9-ff7814740140.html).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

In the wake of the scandal, the three executive officials, entangled in turmoil, did not resign, and members of both parties did not exhibit significant efforts to move forward with impeachment proceedings.<sup>45</sup> With the advent of the next session, it is possible that members of the General Assembly and general public will call for a more formal investigative process of Lieutenant Governor Fairfax.<sup>46</sup>

## II. THE LEGISLATIVE AGENDA

The 2019 session included its fair share of legislative triumphs and defeats. However, the defeats of this session captivated the state's attention, in particular, the failure to ratify the Equal Rights Amendment.<sup>47</sup> This section, while not entirely comprehensive, provides some of the legislation that the General Assembly considered and passed.

### A. Triumphs

#### 1. Tobacco Purchase Age Raised From 18 to 21.

Virginia is known, historically and presently, as a center for tobacco cultivation.<sup>48</sup> One need not look further than Richmond's Altria Theatre or drive down into Shockoe Bottom, the old tobacco warehouse district of the city, complete with ancient and faded tobacco advertisements on the sides of buildings, to notice this fact. Tobacco has and continues to have an impact on the daily lives of Virginia's smoker and non-smoker alike.<sup>49</sup> Since the first tobacco crop was cultivated by indigenous people, predating the Virginia General Assembly by centuries, even the staunchest Virginia tobacco defenders know about the indisputably addictive nature of nicotine and the adverse health effects from smoking and chewing tobacco.<sup>50</sup>

<sup>45</sup> Fenit Nirappil, *Va. Democrat Backs Off Plan for Impeachment Proceedings Against Lt. Gov. Justin Fairfax*, WASH. POST (Feb. 11, 2019), [https://www.washingtonpost.com/local/virginia-politics/virginia-democrats-weigh-impeachment-of-lt-gov-justin-fairfax-over-sexual-assault-allegations/2019/02/10/b8933a48-2d64-11e9-8ad3-9a5b113ecd3c\\_story.html?noredirect=on](https://www.washingtonpost.com/local/virginia-politics/virginia-democrats-weigh-impeachment-of-lt-gov-justin-fairfax-over-sexual-assault-allegations/2019/02/10/b8933a48-2d64-11e9-8ad3-9a5b113ecd3c_story.html?noredirect=on).

<sup>46</sup> Jake Burns, *Virginia General Assembly Debates Holding Public Hearing on Fairfax Allegations*, WTVR (Apr. 2, 2019), <https://wtvr.com/2019/04/02/virginia-general-assembly-debates-holding-public-hearing-on-fairfax-allegations/>.

<sup>47</sup> *Bid to Revive Equal Rights Amendment in Virginia Fails by 1 Vote*, WHSV (Feb. 21, 2019), <https://www.whsv.com/content/news/Virginia-Senate-panel-passes-Equal-Rights-Amendment-504158291.html>.

<sup>48</sup> *Tobacco in Virginia*, VA. PLACES, <http://www.virginiaplaces.org/agriculture/tobacco.html> (last visited Sept 14, 2019).

<sup>49</sup> *Extinguishing the Tobacco Epidemic in Virginia*, CDC (Apr. 12, 2019), <https://www.cdc.gov/tobacco/about/osh/state-fact-sheets/virginia/index.html>.

<sup>50</sup> Stacy Simon, *US Tobacco Companies Tell the Truth About Addictive Products*, AM. CANCER SOC'Y (Nov 21, 2017) <https://www.cancer.org/latest-news/us-tobacco-companies-tell-the-truth-about-addictive-products.html>; *Tobacco in Virginia*, *supra* note 48.

2019]

“THAT WAS THE YEAR THAT WAS”

9

In an effort to further curb tobacco’s influence on Virginia’s youth, the General Assembly passed House Bill 2748 in late February 2019.<sup>51</sup> The bill, which Governor Northam signed into law, amended the law “relating to purchase, possession, and sale of tobacco products, nicotine vapor products, and alternative nicotine products” to those under age twenty-one.<sup>52</sup> The measure passed the House of Delegates in a 62-32 vote and later passed the Senate with a vote of 32-7.<sup>53</sup> The bill’s patron, Delegate Christopher Stolle (R-Virginia Beach), a medical doctor in his own right, argued that the bill was “a common-sense way to address this escalating public health concern.”<sup>54</sup> Delegate Stolle cited the rise in vaping among teenagers, “at a time when the use of traditional tobacco is at an all-time low” as a reason for the legislation.<sup>55</sup>

## 2. Happy Hour Advertising

Travelers to Richmond before 1961 were treated to a city that a visiting serviceman once described as, “neither bright, nor, gay, nor pretty” due to Victorian restrictions on alcohol within the city limits on certain days.<sup>56</sup> Since the dry days of the mid-century, Virginia, as a whole, has retained some of the old “blue laws” that kept distance between its citizens and the bottle.<sup>57</sup> In a reformatory spirit, the General Assembly passed House Bill 2073 / Senate Bill 1726 which expands the ability of restaurants and bars across the Commonwealth to advertise prices of featured beverages during happy hour as long as the permitted creative advertising does not encourage overconsumption or underage drinking.<sup>58</sup>

## 3. Broader Insurance Coverage For Adults With Autism

The presence of Autism Spectrum Disorder among children has drastically increased over the last decade, with one in every fifty-nine children now falling on the spectrum, in contrast to one in every 150 in 2000.<sup>59</sup> With

<sup>51</sup> H.B. 2748, 2019 Gen. Assemb., Reg. Sess. (Va. 2019); *see also* HB2748, VOTE SMART, <https://votesmart.org/bill/26051/66209/increases-age-for-tobacco-sale-regulations#.XYP1lpNKjUo> (last visited Sept. 19, 2019) (noting that HB 2748 was passed on February 13, 2019).

<sup>52</sup> H.B. 2748, 2019 Gen. Assemb., Reg. Sess. (Va. 2019).

<sup>53</sup> Lia Tabackman, *It’s Official: Northam Signs Bill to Raise Virginia’s Tobacco Purchasing Age to 21*, WTVR (Feb. 14, 2019), <https://wtvr.com/2019/02/14/virginia-house-and-senate-vote-to-raise-age-to-buy-tobacco-vaporproducts/>.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> PARKE ROUSE, *WE HAPPY W.A.S.P.’S: VIRGINIA IN THE DAYS OF HARRY BYRD AND JIM CROW* 22 (1996).

<sup>57</sup> *See generally* Ellen Debenport, *Blue Laws as Old as the South*, UPI (Aug. 6, 1984), <https://www.upi.com/Archives/1984/08/06/Blue-laws-as-old-as-the-South/5292460612800/> (reviewing different states’ so-called “blue laws”).

<sup>58</sup> Act of Feb. 15, 2019, ch. 29, 2019 Va. Acts 2 (codified as amended at VA. CODE § 4.1-111 (2019)).

<sup>59</sup> *Data & Statistics on Autism Spectrum Disorder*, CTR. DISEASE CONTROL, <https://www.cdc.gov/ncbddd/autism/data.html> (last visited July 23, 2019).

the increase in people who fall on the autism spectrum, many state legislatures have responded to the associated public health challenges, including care for those dealing with the disorder.<sup>60</sup> Broadening its earlier efforts, the General Assembly passed a bill that Del. Bob Thomas (R- Stafford/Fredericksburg) and Sen. Jill Vogel (R-Clarke/Fauquier) introduced, that completely eliminates the age cap on Virginia's insurance mandate for adult Virginians with autism or on the autism spectrum.<sup>61</sup> The legislation, signed by Governor Northam expanded the previous law which only required coverage for individuals between two and ten years of age, and provides expanded access for those individuals on group plans.<sup>62</sup> As a result, countless Virginians with autism will receive better care and treatment.<sup>63</sup>

#### 4. Repeal of the 'King's Dominion' Law

This session, the General Assembly effectively repealed the statute dubbed the "King's Dominion" law, which changed the time that Virginia students return to school.<sup>64</sup> The former law required that Virginia students begin the school year after Labor Day, unless the district applied for the appropriate waiver to begin the school year in August.<sup>65</sup> In the last thirty years, many districts have applied and received that waiver, starting school in the waning weeks of August. Under the new law, originally HB 1652/SB 1005, school districts across the Commonwealth have the ability to set the first day of school as long as it does not fall fourteen days before Labor Day, and on the condition that students have a four day weekend for the Labor Day holiday.<sup>66</sup>

<sup>60</sup> See H.B. 2577, 2019 Gen. Assemb., Reg. Sess. (Va. 2019); see also S.B. 1693, 2019 Gen. Assemb., Reg. Sess. (Va. 2019); *Autism and Insurance Coverage | State Laws*, NAT'L CONF. ST. LEGISLATURES (Aug. 8, 2018), <http://www.ncsl.org/research/health/autism-and-insurance-coverage-state-laws.aspx>.

<sup>61</sup> See Act of Mar. 18, 2019, ch. 452, Va. Acts 2–3 (codified as amended at VA. CODE § 38.2-3418.17 (2019)).

<sup>62</sup> Vernon Freeman Jr., *Governor Northam Signs Law to Remove Autism Health Coverage Age Cap*, WTVR (Mar. 21, 2019), <https://wtvr.com/2019/03/21/governor-northam-signs-law-to-remove-autism-health-coverage-age-cap/>.

<sup>63</sup> *Id.*

<sup>64</sup> Maria Carrasco, *New Law Allows Virginia Schools to Open Two Weeks Earlier*, NBC 4 WASH. (Mar. 22, 2019), <https://www.nbcwashington.com/news/local/New-Law-Allows-Virginia-Schools-to-Open-Two-Weeks-Earlier-507525941.html>. The moniker takes its name from the popular King's Dominion amusement park outside of Richmond. The original law, passed in the 1980s, was meant to give the Virginia tourism industry a revenue boost at the end of the summer. See Jake Burns, *The 'Kings Dominion Law' — Breaking Down Why Schools Start After Labor Day*, WTVR (Aug. 30, 2018), <https://wtvr.com/2018/08/29/kings-dominion-law/>.

<sup>65</sup> Maria Carrasco, *New Law Allows Virginia Schools to Open Two Weeks Earlier*, NBC 4 WASH. (Mar. 22, 2019), <https://www.nbcwashington.com/news/local/New-Law-Allows-Virginia-Schools-to-Open-Two-Weeks-Earlier-507525941.html>.

<sup>66</sup> Act of Mar. 18, 2019, ch. 569, 2019 Va. Acts 1 (codified as amended at VA. CODE § 22.1-79.1 (2019)).

2019]

“THAT WAS THE YEAR THAT WAS”

11

Before passage of the law, the majority of the Commonwealth’s eastern counties opened following Labor Day; and the western counties applied for waivers, opening school before Labor Day in consideration of severe weather.<sup>67</sup> One advocate for an earlier start to the school year stated, “having limitations around when schools can start can pose a lot of challenges to school divisions.”<sup>68</sup>

### 5. Capital Murder Law Change

In May 2017, Virginia State Police Special Agent Mike Walter was patrolling Richmond’s Mosby Court housing project.<sup>69</sup> Special Agent Walter, while on patrol with his partner, a man shot Special Agent Walter after he and his partner approached the man’s car.<sup>70</sup> The man, Travis Ball, fled the crime scene and was apprehended about seventy miles from Richmond.<sup>71</sup> Ball originally entered an Alford plea, acknowledging the strength of the evidence against him without admitting guilt.<sup>72</sup> Under that plea agreement, Ball escaped the death penalty and was sentenced to life in prison without parole, but ultimately received a suspended sentence of thirty-six years because of his plea.<sup>73</sup>

Following the deliberation, Special Agent Walter’s widow publicly expressed her disappointment with the length of Ball’s sentence for her husband’s murder and attracted the attention of Sen. Bill Carrico (R-Bristol) who cosponsored the bill to amend the capital murder law.<sup>74</sup> Introduced as Senate Bill 1501, the legislation called for “no less than a mandatory minimum term of confinement” of life in prison for “the willful, deliberate, and premeditated killing of a law-enforcement officer.”<sup>75</sup> In March, the Governor signed the

<sup>67</sup> Jake Burns, *The ‘Kings Dominion Law’—Breaking Down Why Schools Start After Labor Day*, WTVR (Aug. 30, 2018), <https://wtvr.com/2018/08/29/kings-dominion-law/>.

<sup>68</sup> *Id.*

<sup>69</sup> Ali Rockett, *Richmond Man Who Killed Virginia State Police Special Agent in Mosby Court Enters Alford Plea, Avoiding Death Penalty*, RICH. TIMES-DISPATCH (Sep. 27, 2018), [https://www.richmond.com/news/local/crime/richmond-man-who-killed-virginia-state-police-special-agent-in/article\\_c04597b2-7ea8-52de-8c06-18ce79e22ca9.html](https://www.richmond.com/news/local/crime/richmond-man-who-killed-virginia-state-police-special-agent-in/article_c04597b2-7ea8-52de-8c06-18ce79e22ca9.html).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> Ali Rockett, *UPDATE: Richmond Man Sentenced to 36 years for Killing State Police Officer*, RICH. TIMES-DISPATCH (Oct. 11, 2018), [https://www.richmond.com/news/local/crime/update-richmond-man-sentenced-to-years-for-killing-state-police/article\\_3fd5ab4c-b56a-5ace-ae3b-1888f29aef55.html](https://www.richmond.com/news/local/crime/update-richmond-man-sentenced-to-years-for-killing-state-police/article_3fd5ab4c-b56a-5ace-ae3b-1888f29aef55.html).

<sup>74</sup> Laura French & Mike Bergazzi, *Northam Signs Bill That Will Stiffen Penalties for People Who Kill Police Officers*, WTVR (Mar. 21, 2019), <https://wtvr.com/2019/03/21/northam-signs-bill-that-will-stiffen-penalties-for-people-who-kill-police-officers-in-virginia/>.

<sup>75</sup> Act of Mar. 21, 2019, ch. 717, 2019 Va. Acts 1 (codified as amended at VA. CODE § 18.2-31 (2019)).



bill into law, which fortifies the penalties for those who kill law enforcement and some other public officials.<sup>76</sup>

## 6. Other Bills Passed

The General Assembly passed a host of additional legislation this session. During this year's regular session, the General Assembly further advanced Virginia's tax code to mirror the recent changes to the federal tax code.<sup>77</sup> Further, the General Assembly expanded the list of mandatory reporters for child abuse and neglect to include religious officials such as priests and rabbis, unless the religion's doctrine prohibits the divulgence of information.<sup>78</sup> Minimum wage exemptions pertaining to 'newsboys,' shoe-shiners, babysitters who work more than ten hours a week, ushers, doormen, concession attendants, and theatre cashiers were removed.<sup>79</sup> Further, drivers face stiffer misdemeanor penalties for not yielding or moving over to allow emergency vehicles or other vehicles with flashing lights pass.<sup>80</sup> Virginia is also progressing with the national trend of cannabis research and decriminalization.<sup>81</sup> This session, the General Assembly voted to pass an industrial hemp bill that is laying the groundwork for further research surrounding hemp production and cannabis-related medical research.<sup>82</sup> The new law, which took effect on July 1, 2019, creates an affirmative defense that "protects" patients who use medicinal marijuana products containing CBD and THC-A oil, which are otherwise illegal for recreational use on the federal level.<sup>83</sup>

<sup>76</sup> Act of Mar. 21, 2019, ch. 717, 2019 Va. Acts 1 (codified as amended at VA. CODE § 18.2-31 (2019)); see also French & Bergazzi, *supra* note 74.

<sup>77</sup> Act of Feb. 15, 2019, ch. 17, 2019 Va. Acts 1–10 (codified as amended at VA. CODE §§ 58.1-301, -322.03, -402 (2019)).

<sup>78</sup> Act of Mar. 18, 2019, ch. 414, 2019 Va. Acts 1 (codified as amended at VA. CODE § 63.2-1509 (2019)).

<sup>79</sup> Act of Mar. 8, 2019, ch. 330, 2019 Va. Acts 1 (codified as amended at VA. CODE § 40.1-28.9 (2019)).

<sup>80</sup> Act of Apr. 29, 2019, ch. 850, 2019 Va. Acts (codified as amended at VA. CODE § 46.2-861.1 (2019), repealing VA. CODE § 46.2-921.1 (2019)).

<sup>81</sup> See generally Act of Mar. 21, 2019, ch. 653, 2019 Va. Acts (codified as amended at VA. CODE §§ 3.2-4112,

-4114, -4114.2, -4115, -116, -4118, -4119, 18.2-247, 54.1-3401 (2019)) (to be codified at VA. CODE §§ 54.1-3408.3, -3446 (2019)) (repealing VA. CODE §§ 3.2-4114.1, -4117 (2019)) (allowing medical research into, and production of, industrial hemp); see also Michael Balderston, *Is Virginia Seeing Green When it Comes to Cannabis?*, NORTHERNVIRGINIA (Dec. 27, 2018), <https://www.northernvirginiamag.com/culture/news/2018/12/27/is-virginia-seeing-green-when-it-comes-to-cannabis/> (comparing Virginia's cannabis legalization process with other states).

<sup>82</sup> Act of Mar. 21, 2019, ch. 653, 2019 Va. Acts (codified as amended at VA. CODE §§ 3.2-4112, -4114, -4114.2, -4115, -116, -4118, -4119, 18.2-247, 54.1-3401 (2019)) (to be codified at VA. CODE §§ 54.1-3408.3, -3446 (2019)) (repealing VA. CODE §§ 3.2-4114.1, -4117 (2019)).

<sup>83</sup> Lia Tabackman, *What You Need to Know About the Medical Marijuana Coming to Virginia in 2019*, WTVR (July 3, 2019), <https://wtvr.com/2019/07/02/what-you-need-to-know-about-the-medical-marijuana-coming-to-virginia-in-2019/>.

2019]

“THAT WAS THE YEAR THAT WAS”

13

Additionally, the General Assembly made a deal to create a 16-member redistricting commission that will be tasked with redrawing Virginia’s congressional district boundaries following the 2020 census.<sup>84</sup>

### *B. Defeats*

Despite the efforts of delegates, senators, and the horde of lobbyists who descend upon Virginia’s state capitol on an annual basis, a host of bills were defeated either on the floor or in committee meetings.<sup>85</sup>

#### 1. Ratification of the Equal Rights Amendment

This session, Virginia could have been the thirty-eighth state to ratify the Equal Rights Amendment, which would have cemented the concept that “equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex” into the United States Constitution.<sup>86</sup> Drafted in 1921 by Alice Paul and first introduced in its original form in 1923 to the United States Congress, the Equal Rights Amendment sought to ensure constitutional protection against discrimination on the basis of sex.<sup>87</sup> After more than forty-five years of its inception, a movement developed in the late 1960s, spearheaded by feminist groups and the late Rep. Martha Griffiths (D-MI), to reintroduce the amendment to the United States Congress.<sup>88</sup> By 1972, the 92<sup>nd</sup> Congress overwhelmingly supported passage of the Act and then-President Nixon even endorsed it.<sup>89</sup>

Sent for ratification to the states in 1972, the Amendment constitutionally required ratification by three-fourths of states’ legislatures for its adoption.<sup>90</sup> Between 1972 and 1977, thirty-five states ratified the Amendment, and Congress extended the ratification deadline another three years from the original 1979 deadline until 1982.<sup>91</sup> By 1982, fifteen states failed to ratify the Amendment and five states called for the rescission of their

<sup>84</sup> *Here’s What Succeeded, Failed During Virginia’s Legislative Session*, RICH. TIMES-DISPATCH (Feb. 23, 2019), [https://www.richmond.com/news/virginia/government-politics/general-assembly/here-s-what-succeeded-failed-during-virginia-s-legislative-session/article\\_4bd160c1-3060-57a5-bbea-e990f10d7980.html](https://www.richmond.com/news/virginia/government-politics/general-assembly/here-s-what-succeeded-failed-during-virginia-s-legislative-session/article_4bd160c1-3060-57a5-bbea-e990f10d7980.html).

<sup>85</sup> *2019 Session, Bill List: Failed*, VA. LEGIS. INFO. SYS. (Sept. 4, 2019), <https://lis.virginia.gov/cgi-bin/legp604.exe?191+lst+FAI>.

<sup>86</sup> Equal Rights Amendment of 1972, H.R.J. Res. 208, 92d Cong. § 1 (1972).

<sup>87</sup> See Martha Davis, *The Equal Rights Amendment: Then and Now*, 17 COLUM. J. GENDER & L. 419–21 (2008).

<sup>88</sup> See Karen Liu, *The Long Battle for the ERA and Constitutional Equality*, RICHARD NIXON FOUND. (Aug. 5, 2013), <https://www.nixonfoundation.org/2013/08/does-the-bell-toll-for-the-era/>.

<sup>89</sup> *Id.*

<sup>90</sup> *Ratification Info State by State*, ERA, <https://www.equalrightsamendment.org/era-ratification-map> (last visited July 23, 2019); see U.S. CONST. art. VII.

<sup>91</sup> *Ratification Info State by State*, ERA, <https://www.equalrightsamendment.org/era-ratification-map> (last visited July 23, 2019); see U.S. CONST. art. VII.

ratification.<sup>92</sup> Since 1982, Nevada and Illinois, in 2017 and 2018 respectively, ratified the Amendment,<sup>93</sup> leaving only one state to adopt the measure.

In this session, the Virginia Senate approved a ratification resolution, but the efforts died when House subcommittees declined to bring the issue to a full House of Delegates vote.<sup>94</sup> Democratic delegates called for two measures that would bring the ratification resolution to the House of Delegates floor for debate and a vote.<sup>95</sup> Del. Jennifer Carroll Foy (D-Prince William) and Sen. Jennifer McClellan (D-Richmond) led the efforts, while delegates and activists rally across the Commonwealth hoping to ratify the Amendment.<sup>96</sup> Rebuffed by their Republican colleagues at the subcommittee level, House Democrats called for a rule-change to allow bringing the ratification resolution to the floor for a vote.<sup>97</sup> The vote, held toward the end of the regular session, was strictly partisan (50-50), with Democrats voting to hold the vote and Republicans opposing.<sup>98</sup> Del. David Yancey's (R-Newport News) vote was the one exception, as he spoke in favor of the Amendment and voted with the Democrats.<sup>99</sup>

Ratification of the Amendment, like so many other topics in this session, showcased partisan divides.<sup>100</sup> Republicans, who defeated the House measure to bring the Amendment for a floor vote, voted almost unanimously against the measure in the House, while Republicans in the Senate contributed to the passage of the resolution for ratification.<sup>101</sup> Since 1972, when the ratification process began, Republican delegates cite concerns about the expansion of the draft to include women, and claim that pro-choice advocates

<sup>92</sup> *Ratification Info State by State*, ERA, <https://www.equalrightsamendment.org/era-ratification-map> (last visited July 23, 2019); see U.S. CONST. art. VII.

<sup>93</sup> *Ratification Info State by State*, ERA, <https://www.equalrightsamendment.org/era-ratification-map> (last visited July 23, 2019); see U.S. CONST. art. VII.

<sup>94</sup> Mare Albiges, *Equal Rights Amendment Appears Dead in Virginia for 2019. Democrats Vow to Keep Fighting*, DAILY PRESS (Jan. 25, 2019), <https://www.dailypress.com/news/virginia/dp-nws-era-ratification-dies-general-assembly-20190125-story.html>.

<sup>95</sup> See Patricia Sullivan, *Inside the Virginia Capitol, a Legislative Duel Over the ERA*, WASH. POST (Feb. 14, 2019), [https://www.washingtonpost.com/local/virginia-politics/inside-the-virginia-capitol-a-legislative-duel-over-the-era/2019/02/14/fc50c5e6-3081-11e9-813a-0ab2f17e305b\\_story.html](https://www.washingtonpost.com/local/virginia-politics/inside-the-virginia-capitol-a-legislative-duel-over-the-era/2019/02/14/fc50c5e6-3081-11e9-813a-0ab2f17e305b_story.html).

<sup>96</sup> See Jennifer L. McClellan, *Virginia Should Ratify ERA*, RICH. FREE PRESS (Aug. 30, 2018), [richmondfreepress.com/news/2018/aug/30/virginia-should-ratify-era/](http://richmondfreepress.com/news/2018/aug/30/virginia-should-ratify-era/).

<sup>97</sup> Graham Moomaw, *Va. House GOP Defeats Last-Ditch Effort to Force ERA Vote, Dooming Gender-Equality Proposal for the Year*, RICH. TIMES-DISPATCH (Feb. 21, 2019), [https://www.richmond.com/news/virginia/government-politics/general-assembly/va-house-gop-defeats-last-ditch-effort-to-force-era/article\\_c21b30ce-e6b2-582d-8e13-77022805a7ae.html](https://www.richmond.com/news/virginia/government-politics/general-assembly/va-house-gop-defeats-last-ditch-effort-to-force-era/article_c21b30ce-e6b2-582d-8e13-77022805a7ae.html).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> See *id.* (showcasing the final vote's 50-50 split along partisan lines, with Del. Yancey as the sole Republican voting in favor of the Amendment).

<sup>101</sup> See Jenna Portnoy, *ERA Bill Dies for Good in GOP-Controlled Virginia House of Delegates*, WASH. POST (Feb. 21, 2019), [https://www.washingtonpost.com/local/virginia-politics/virginia-house-kills-era-ratification-bill/2019/02/21/82920204-3560-11e9-854a-7a14d7fec96a\\_story.html](https://www.washingtonpost.com/local/virginia-politics/virginia-house-kills-era-ratification-bill/2019/02/21/82920204-3560-11e9-854a-7a14d7fec96a_story.html).

2019]

“THAT WAS THE YEAR THAT WAS”

15

use the Amendment as a tool to expand abortion rights.<sup>102</sup> Further, House Majority Leader Todd Gilbert (R-Shenandoah), claimed that Democrats were “engaged in fear-mongering,” attempting to portray Republicans as “anti-woman.”<sup>103</sup> Democrats have argued that the arguments held by their colleagues across the aisle “maintain[] the status quo” and essentially keep women in a second-class position.<sup>104</sup> Republican leadership explained that the procedural nature of the vote was the impetus for their opposition.<sup>105</sup> House Majority Leader Gilbert expressed concern about the House entertaining special treatment of a single issue against tested procedural mechanisms.<sup>106</sup> While the ERA did not reach the floor of the House of Delegates this session,<sup>107</sup> it is likely that the conversation on ratification will continue among activists and legislators.

## 2. Sexual Orientation Discrimination

### 3.

Multiple bills attacked discriminatory practices on the basis of sexual orientation and gender identity this session.<sup>108</sup> Groups, such as Equality Virginia spearheaded legislators, who brought forth bills ensuring equal treatment for LGBTQ individuals in areas such as housing and discrimination in public accommodation.<sup>109</sup> Despite the recent legal successes of the LGBTQ community in obtaining increased civil rights at national and state levels, and the General Assembly’s historic welcome of Danica Roem (D-Manassas Park) as the body’s first transgender member in 2017, many of the legislative efforts to prohibit discrimination in employment, public accommodation, housing, and insurance (to name a few) were rebuffed.<sup>110</sup> Advocates for anti-discrimination laws expressed hope initially and gained the support of Democratic and some Republican members of the General Assembly.<sup>111</sup> However, many of the proposed bills were not discussed at the committee level and

<sup>102</sup> Moomaw, *supra* note 97.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> See H.D. 2421, 2019 Gen. Assemb., Reg. Sess. (Va. 2019); see also H.D. 2677, 2019 Gen. Assemb., Reg. Sess. (Va. 2019).

<sup>109</sup> See H.D. 2421, 2019 Gen. Assemb., Reg. Sess. (Va. 2019); *Virginia’s General Assembly*, EQUALITY VA., <https://www.equalityvirginia.org/equality-virginia-at-the-general-assembly/> (last visited Sept. 19, 2019).

<sup>110</sup> See James Wellemeyer, *Danica Roem Looks Back on Tumultuous 2019 Va. Legislative Sess.*, WASH. BLADE (Apr. 4, 2019), <https://www.washingtonblade.com/2019/04/04/danica-roem-looks-back-on-tumultuous-2019-va-legislative-session/>.

<sup>111</sup> Graham Moomaw, *Va. House Republicans Let LGBT Non-Discrimination Bills Die Without a Hearing*, RICH. TIMES-DISPATCH (Feb. 15, 2019), [https://www.richmond.com/news/virginia/government-politics/va-house-republicans-let-lgbt-non-discrimination-bills-die-without/article\\_ea3fce20-6359-5bfc-9a0f-0c09a0f640aa.html](https://www.richmond.com/news/virginia/government-politics/va-house-republicans-let-lgbt-non-discrimination-bills-die-without/article_ea3fce20-6359-5bfc-9a0f-0c09a0f640aa.html).

died shortly thereafter, following some of the Republican majority's actions.<sup>112</sup>

The discussion of the bills took a partisan turn with Democrats claiming that Republican efforts are decreasing protections for LGBTQ Virginians, while Republicans cite the intensity of the advocacy community.<sup>113</sup> Del. Chris Peace (R-Hanover), the General Laws Committee Chairman, alleges that the bill has not yet been addressed because of the excessive amount of legislation given the short deliberation time.<sup>114</sup> Peace further said that the advocacy community took a "my way or the highway approach" that conflicted with the policymaking mechanisms of the General Assembly.<sup>115</sup>

#### 4. Gun Control Measures

Historically, Virginia is classified as a "gun friendly" state and is home to the National Rifle Association's headquarters in Fairfax.<sup>116</sup> Virginia citizens range from the staunchest of Second Amendment advocates to crusaders for increased gun control.<sup>117</sup> The General Assembly, for the last few sessions, has been a forum of debate over gun control issues and gun rights in the Commonwealth.<sup>118</sup> In particular, national events in the last two decades have affected debate within the General Assembly.<sup>119</sup> In 2007, the General Assembly heard, but did not necessarily pass, gun control bills and proposals, after a deranged student gunned down thirty-three people at Virginia Tech—most of whom were students.<sup>120</sup>

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> Associated Press, *Virginia Governor Announces Special Session on Gun Control*, L.A. TIMES (June 4, 2019), <https://www.latimes.com/nation/la-na-virginia-beach-governor-gun-control-20190604-story.html>.

<sup>117</sup> See Veronica Stracqualursi, *Virginia Session to Debate Gun Control Adjourns Without Action*, CNN (Jul. 9, 2019), <https://www.cnn.com/2019/07/09/politics/virginia-special-session-gun-legislation/index.html> (exemplifying this dichotomy with an example of both sides protesting).

<sup>118</sup> See, e.g., H.D. 4003, 2019 Gen. Assemb., Spec. Sess. (Va. 2019) (removal of firearms from persons posing substantial risk); H.D. 4015, 2019 Gen. Assemb., Spec. Sess. (Va. 2019) (firearm transfers, criminal history record information, penalties); H.D. 198, 2018 Gen. Assemb., Reg. Sess. (Va. 2018) (removal of firearms from persons posing a substantial risk of personal injury to self or others; penalties); H.D. 1406, 2017 Gen. Assemb., Reg. Sess. (Va. 2017) (restoration of right to possess firearms).

<sup>119</sup> See generally Mollie Laird, *Virginia's 2018 General Assembly Session in Review*, 22 RICH. PUB. INT. L. REV. 149, 153–54 (2019) (discussing how the Parkland, Florida and Las Vegas, Nevada shootings affected debate during the 2018 General Assembly session).

<sup>120</sup> See Christine Hauser & Anahad O'Connor, *Virginia Tech Shooting Leaves 33 Dead*, N.Y. TIMES (Apr. 16, 2007), <https://www.nytimes.com/2007/04/16/us/16cnd-shooting.html>; Asher Stockler, *NRA Slams Virginia Governor for Taking-Up Gun Violence Reform Measures*, NEWSWEEK (June 4, 2019), <https://www.newsweek.com/nra-hits-virginia-governor-taking-gun-violence-reform-measures-1442201>.

2019]

“THAT WAS THE YEAR THAT WAS”

17

Last year’s Parkland School Shooting, which killed fourteen students and three staff members, was also widely discussed during the 2018 General Assembly session.<sup>121</sup> With mass shootings unfortunately ever-present in our society today, the General Assembly heard multiple gun-control bills during its session.<sup>122</sup> Most proposed measures failed to garner enough support. House Bill 1763, sponsored by Del. Rip Sullivan (D-Arlington) called for the creation of a procedural framework for certain state officials, by order of a magistrate, to remove firearms from persons posing substantial risk of violence or substantial risk of injury to themselves or others.<sup>123</sup> The bill failed at the committee level. Virginia will likely continue to see deadlock on gun issues due to the presence of both gun rights and gun control advocates within the General Assembly.<sup>124</sup>

### C. Other Notable Defeats

Other notable bills died in committee or on the floor of one or both chambers this session. A Senate bill providing food stamp and Temporary Assistance for Needy Families (TANF) benefits to those otherwise eligible, but have drug-related felony records, was defeated.<sup>125</sup> Additionally, a bill to include post-traumatic stress disorder as an occupational disease under the Virginia Workers’ Compensation Act for those public officials, such as law enforcement officials, firefighters, 911 operators, and others, was also defeated.<sup>126</sup> Hands Free Driving measures, requiring that drivers not hold handheld mobile devices while operating a motor vehicle, were defeated, although the General Assembly passed a bill requiring hands-free driving in

<sup>121</sup> Laird, *supra* note 119; see also Jordan Pascale, *After Parkland School Shooting, Virginia Democrats Tell General Assembly to Bring Back Gun Bills*, VIRGINIAN-PILOT (Mar. 1, 2018), [https://www.pilotonline.com/government/virginia/article\\_af54e382-c45a-5f77-b3fb-b533e8b7d61f.html](https://www.pilotonline.com/government/virginia/article_af54e382-c45a-5f77-b3fb-b533e8b7d61f.html).

<sup>122</sup> Charlotte R. Woods, *1 of 70 Gun Bills was Approved in Virginia as Issue Deeply Divides Legislators*, DELMARVA NOW (Mar. 13, 2018), <https://www.delmarvanow.com/story/news/2018/03/13/virginia-gun-bills-fail/418888002/>.

<sup>123</sup> H.D. 1763, 2019 Gen. Assemb., Reg. Sess. (Va. 2019).

<sup>124</sup> Gregory S. Schneider, *Gun Debate Ends Abruptly in Virginia as GOP-Controlled Legislature Adjourns After 90 Minutes*, WASH. POST (July 9, 2019), [https://www.washingtonpost.com/local/virginia-politics/gun-debate-hits-full-throttle-in-richmond-as-legislature-convenes/2019/07/09/caf20590-a1d4-11e9-bd56-eac6bb02d01d\\_story.html](https://www.washingtonpost.com/local/virginia-politics/gun-debate-hits-full-throttle-in-richmond-as-legislature-convenes/2019/07/09/caf20590-a1d4-11e9-bd56-eac6bb02d01d_story.html).

<sup>125</sup> S.B. 1129, 2019 Gen. Assemb., Reg. Sess. (Va. 2019); see also *SB 1129 Food Stamps and TANF; Eligibility, Drug-Related Felonies.*, LEGIS. INFO. SYS., <https://lis.virginia.gov/cgi-bin/legp604.exe?191+sum+SB1129> (last visited Sept. 20, 2019) (noting that the bill was left in committee).

<sup>126</sup> See S.B. 1465, 2019 Gen. Assemb., Reg. Sess. (Va. 2019); see also *SB 1465 Workers' Compensation; Occupation Disease Presumptions, PTSD.*, LEGIS. INFO. SYS., <https://lis.virginia.gov/cgi-bin/legp604.exe?191+sum+SB1465> (last visited Sept. 20, 2019) (noting that the bill was “passed by indefinitely”).

work areas.<sup>127</sup> Current law still prohibits reading emails or texting while driving.<sup>128</sup>

### III. GOVERNOR NORTHAM'S VETOES

Governor Ralph Northam vetoed 34 bills combined from the House of Delegates and the Virginia Senate.<sup>129</sup> The bills ranged from a sanctuary city prohibition bill that House and Senate Republicans proposed,<sup>130</sup> a bill that would have permitted Virginia manufacturers and distributors to manufacture switchblade knives,<sup>131</sup> to a bill that would have automatically granted out-of-state residents with a temporary concealed carry permit if the Virginia State Police did not review their application within ninety days.<sup>132</sup> Governor Northam's veto actions generally aligned with his legislative priorities.<sup>133</sup>

### IV. THE SPECIAL SESSION: JULY 2019

The Commonwealth experienced yet another tragedy in May of this year. On May 31, a disgruntled municipal employee entered the Municipal Center in Virginia Beach and killed twelve people.<sup>134</sup> Among the victims were many career city employees.<sup>135</sup> In response, Governor Northam called the General Assembly back to Richmond to reconvene for a one-week special session beginning on July 9.<sup>136</sup> The Governor called the session in hopes of

<sup>127</sup> See Act of Apr. 29, 2019, ch. 849, 2019 Va. Acts (codified as amended at VA. CODE § 46.2-1078.1 (2019)) (penalizing use of handheld personal devices while driving in work zones); Jordan Pascale, *It's Still Legal To Use Your Phone – Mostly – After Failure Of Hands-Free Bill In Virginia*, WAMU (Feb. 25, 2019), <https://wamu.org/story/19/02/25/its-still-legal-to-use-your-phone-mostly-after-failure-of-hands-free-bill-in-virginia/>.

<sup>128</sup> VA CODE § 46.2-1078.1(A)(2) (2019).

<sup>129</sup> See 2019 Session Bill List: Vetoed by Governor, LEGIS. INFO. SYS. <https://lis.virginia.gov/cgi-bin/legp604.exe?191+lst+VET> (last visited Sept. 6, 2019).

<sup>130</sup> Mel Leonor, *Northam Vetoes 'Sanctuary Cities' Bill*, RICH. TIMES-DISPATCH (Mar. 19, 2019), [https://www.richmond.com/news/virginia/government-politics/northam-vetoes-sanctuary-cities-bill/article\\_a0594c7e-b87f-5e4e-9eb8-feb32abdbfc7.html](https://www.richmond.com/news/virginia/government-politics/northam-vetoes-sanctuary-cities-bill/article_a0594c7e-b87f-5e4e-9eb8-feb32abdbfc7.html)

<sup>131</sup> Amy Friedenberger, *Northam Vetoes Bill on Making Switchblade Knives*, RICH. TIMES-DISPATCH (Mar. 21, 2019), [https://www.richmond.com/news/virginia/government-politics/general-assembly/northam-vetoes-bill-on-making-switchblade-knives/article\\_e64c8958-3729-5494-8675-4710d1c8c531.html](https://www.richmond.com/news/virginia/government-politics/general-assembly/northam-vetoes-bill-on-making-switchblade-knives/article_e64c8958-3729-5494-8675-4710d1c8c531.html).

<sup>132</sup> Max Smith, *Virginia Gov. Northam Vetoes First Bill of the Year*, WTOP NEWS (Mar. 12, 2019, 4:38 PM), <https://wtop.com/virginia/2019/03/virginia-gov-northam-vetoes-first-bill-of-the-year/>.

<sup>133</sup> See Fenit Nirappil, *What Virginia's Governor-Elect Ralph Northam (D) Promised During His Campaign*, WASH. POST (Nov. 23, 2017), [https://www.washingtonpost.com/local/virginia-politics/what-virginias-governor-elect-ralph-northam-d-promised-during-his-campaign/2017/11/23/a6a2dc4e-c992-11e7-8321-481fd63f174d\\_story.html](https://www.washingtonpost.com/local/virginia-politics/what-virginias-governor-elect-ralph-northam-d-promised-during-his-campaign/2017/11/23/a6a2dc4e-c992-11e7-8321-481fd63f174d_story.html) (noting that Northam made campaign promises concerning illegal immigration reform and gun control).

<sup>134</sup> Alan Blinder, Glenn Thrush, & Sandra E. Garcia, *Virginia Beach Shooting: A City Grieves Its Workers a Day After Horror*, N.Y. TIMES (June 1, 2019), <https://www.nytimes.com/2019/06/01/us/virginia-beach-shooting.html>.

<sup>135</sup> *Id.*

<sup>136</sup> Gregory S. Schneider, *Northam Sets July 9 for Special Session to Consider Gun Control Legislation*, WASH. POST (June 7, 2019), [https://www.washingtonpost.com/local/virginia-politics/northam-sets-july-9-for-special-session-to-consider-gun-control-legislation/](https://www.washingtonpost.com/local/virginia-politics/northam-sets-july-9-for-special-session-to-consider-gun-control-legislation/2019/06/07/northam-sets-july-9-for-special-session-to-consider-gun-control-legislation/)

2019]

“THAT WAS THE YEAR THAT WAS”

19

discussing gun control efforts to prevent future mass shootings.<sup>137</sup> In preparation for the session, delegates returned to Richmond as gun control and gun rights activists convened on the Capitol grounds, ready to voice their positions.<sup>138</sup>

However, within the first two hours of the session, the House of Delegates adjourned, without passing any legislation.<sup>139</sup> Instead, the General Assembly, whose members are up for re-election in November, 2019, will likely tackle issues pertaining to gun control and gun rights after the fall election.<sup>140</sup> Republicans within both houses called for adjournment over the objections of Democratic members.<sup>141</sup> Republican members instead called for further collection of gun violence statistics.<sup>142</sup> Even Virginia Beach mayor, Bobby Dyer (R), called the session “ill-timed,” stating that the special session “[could] create more polarization at a time when we should be coming together. I wish they would’ve waited.”<sup>143</sup> Conversely, Attorney General Mark Herring and Richmond mayor, Levar Stoney, both Democrats, called the Republican actions “pathetic” and “cowardly,” respectively.<sup>144</sup>

The partisan undertones of the special session were apparent on both sides of the aisle. House Speaker Kirk Cox called the special session an “election-year stunt” by the Governor.<sup>145</sup> Speaker Cox further suggested that the session was a ploy by the Governor to avert attention from his own scandal in early February, suggesting the session was “hasty and suspect when considered against the backdrop of the last few months.”<sup>146</sup> Before the start of the session, lawmakers on both sides of the aisle submitted legislation for consideration by the House and Senate.<sup>147</sup> Many of the bills

---

9-for-special-session-to-consider-gun-control-legislation/2019/06/07/03f210b2-8937-11e9-98c1-e945ae5db8fb\_story.html.

<sup>137</sup> See Marie Albiges & Peter Coutu, *Republican Lawmakers Vote to Adjourn Special Session on Guns Without Debating Legislation*, VIRGINIAN-PILOT (July 9, 2019), [https://www.pilotonline.com/government/virginia/article\\_accacc58-a258-11e9-b828-e3483991b816.html](https://www.pilotonline.com/government/virginia/article_accacc58-a258-11e9-b828-e3483991b816.html).

<sup>138</sup> See Schneider, *supra* note 124.

<sup>139</sup> *Id.*

<sup>140</sup> See Albiges & Coutu, *supra* note 137.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> Cameron Thompson, Gabrielle Harmon & CNN Wire, *Virginia Republicans End Governor Northam’s Special Session on Gun Violence One Hour After It Starts*, WTVR (July 9, 2019), <https://wtvr.com/2019/07/09/gun-violence-special-session-ends/>.

<sup>145</sup> John Bowden, *Virginia Legislature Adjourns 2 Hours into Special Session Called After Mass Shooting*, HILL (July 9, 2019), <https://thehill.com/homenews/state-watch/452252-virginia-legislature-adjourns-2-hours-into-special-session-called-after>.

<sup>146</sup> Associated Press, *supra* note 116.

<sup>147</sup> Gregory S. Schneider & Laura Vozzela, *Leading GOP Senator Files Gun Control Bill on Eve of Special Session in Virginia*, WASH. POST (July 8, 2019), [https://www.washingtonpost.com/local/virginia-politics/gop-leader-files-gun-control-bill-on-eve-of-special-session-in-virginia/2019/07/08/ec767360-a196-11e9-bd56-eac6bb02d01d\\_story.html](https://www.washingtonpost.com/local/virginia-politics/gop-leader-files-gun-control-bill-on-eve-of-special-session-in-virginia/2019/07/08/ec767360-a196-11e9-bd56-eac6bb02d01d_story.html).



discussed changes to Virginia's gun laws<sup>148</sup>, with some calling for drastic changes to the current legal framework.<sup>149</sup> Senate Majority Leader Tommy Norment (R-James City County) proposed a bill to ban all guns from municipal buildings, and in response, Sen. Bill Stanley, (R-Franklin) offered his resignation as Senate majority whip.<sup>150</sup> Stanley, a staunch defender of Second Amendment rights, was later reinstated as whip after a caucus-wide vote.<sup>151</sup> Stanley expressed his anger at Sen. Norment's action, suggesting that "if Northam 'gets one bill out of here he declares total victory.'"<sup>152</sup>

If Democrats gain the majority in the November elections, it is likely that many of the bills hoping to be considered during the special session will be introduced for discussion.<sup>153</sup> Even if Republicans maintain their majority in the General Assembly, it is possible that some of the bills that will be considered will reach the House and Senate floors, but not likely.<sup>154</sup>

### CONCLUSION

The 2019 session of the Virginia General Assembly likely received more national attention than usual due to the unfortunate scandals at the top of Virginia's government. Governor Ralph Northam continues to serve as the chief executive of the Commonwealth and, over the course of the next year, will likely strive to gain his constituents' forgiveness for his previous behavior, while pursuing a rigorous and progressive agenda in the face of criticism by both Republicans and those within his own party. Lieutenant Governor Fairfax is still under some threat of a General Assembly investigation in the next session, and will also likely strive to regain trust among his constituents—particularly because of the actions from his youth, and his ambitions for higher office. Attorney General Mark Herring will likely work in a similar vein as Governor Northam, pursuing forgiveness and ensuring that Virginia's legal system is just.

<sup>148</sup> *Id.*

<sup>149</sup> *See id.* (explaining that some proposals included banning certain gun paraphernalia and allowing courts to seize weapons from those deemed threatening).

<sup>150</sup> Vernon Freeman Jr., *Virginia Senate GOP Majority Whip Resigns in Protest to Majority Leader's Gun Bill*, WTVR (July 9, 2019), <https://wtvr.com/2019/07/09/virginia-senate-gop-majority-whip-resigns-in-protest-to-majority-leaders-gun-bill/>.

<sup>151</sup> Patrick Wilson, *Norment Admits to 'Machiavellian Thoughts' After Introducing, Then Striking, Gun Control Bill*, RICH. TIMES-DISPATCH (July 9, 2019), [https://www.richmond.com/news/virginia/government-politics/sen-stanley-offers-to-quit-va-senate-gop-leadership-post/article\\_869d4dba-537f-55b1-931c-64247fc299c8.html](https://www.richmond.com/news/virginia/government-politics/sen-stanley-offers-to-quit-va-senate-gop-leadership-post/article_869d4dba-537f-55b1-931c-64247fc299c8.html).

<sup>152</sup> Patrick Wilson, *Sen. Tommy Norment Says He'll Withdraw His Gun Control Bill as Special Session Opens*, DAILY PROGRESS (July 9, 2019), [https://www.dailypress.com/news/state/sen-tommy-norment-says-he-ll-withdraw-his-gun-control/article\\_8b6e4613-99d2-5dd6-832f-083647e49567.html](https://www.dailypress.com/news/state/sen-tommy-norment-says-he-ll-withdraw-his-gun-control/article_8b6e4613-99d2-5dd6-832f-083647e49567.html).

<sup>153</sup> *See* Albiges & Coutu, *supra* note 137.

<sup>154</sup> *See generally id.* (explaining the current stalemate between Democrats and Republicans concerning gun control).

2019]

“THAT WAS THE YEAR THAT WAS”

21

From a legislative perspective, this session proves that Virginia reflects the positive and concerning national trends. The Commonwealth is a place filled with two opposing segments of society who value and advocate for different and often conflicting aims.<sup>155</sup> The effects of significant demographic changes within the last twenty years have particularly marked Virginia.<sup>156</sup> She has swayed in the political tides, from the solidly conservative Southern state of the last half-century and vestige of the Old South, into a true “purple” state with both liberal and conservative contingents.<sup>157</sup> Virginia and her government, like many other Southern states, have had to confront a complicated past on issues of race, striving for solutions to ensure effective governance. In looking at the issues, this past session illustrates the deep ideological divisions that are within the Commonwealth, but also illustrates areas of compromise. For instance, compromise was achieved in matters of public health, with the passage of expanded healthcare of adults with autism;<sup>158</sup> and the prohibition of tobacco and nicotine products for those under twenty-one.<sup>159</sup>

Virginia’s failure to ratify the Equal Rights Amendment,<sup>160</sup> and the defeat of legislation focusing on gun regulation<sup>161</sup>—most publicly seen in the July Special Session’s inaction—best illustrate national, cultural divides. Partisanship in Virginia is evidently and overtly following the national mood on both the left and right sides, following the national mood is evident and overt.<sup>162</sup> Partially due to that partisanship, the Virginia General Assembly, like most legislative bodies, has left much on the table for future consideration.<sup>163</sup> Given the excitement—whether good or bad—of the last two sessions, the General Assembly is sure to continue its 400-year-old traditions while developing and embracing new legislation and ideas for the Commonwealth.

<sup>155</sup> See e.g., *id.* (explaining the Virginia General Assembly’s conflicting views on Medicaid and tax breaks).

<sup>156</sup> Bob Gibson, *Opinion/Commentary: Changing Demographics Also Shift Virginia Politics*, DAILY PROGRESS (Nov. 18, 2018), [https://www.dailyprogress.com/opinion/opinion-commentary-changing-demographics-also-shift-virginia-politics/article\\_1a62feca-e943-11e8-902e-cfa9dbe87f1c.html](https://www.dailyprogress.com/opinion/opinion-commentary-changing-demographics-also-shift-virginia-politics/article_1a62feca-e943-11e8-902e-cfa9dbe87f1c.html).

<sup>157</sup> Erica Jones, *Why Virginia Is Still a Swing State*, NBC4 (Nov. 9, 2017), <https://www.nbcwashington.com/news/local/Is-Battleground-Virginia-Turning-Blue-456149573.html>.

<sup>158</sup> Freeman Jr., *supra* note 62.

<sup>159</sup> Tabackman, *supra* note 53.

<sup>160</sup> *Bid to Revive Equal Rights Amendment in Virginia Fails by 1 Vote*, *supra* note 47.

<sup>161</sup> Woods, *supra* note 122.

<sup>162</sup> Compare Albiges & Coutu, *supra* note 137 (discussing the Republican vote to adjourn the Special Session to consider new gun laws despite Democrat objection), with Chandelis Duster, ‘Time’s Up’: Frustrated Democrats Urge McConnell to Finally Bring America’s Gun Debate to Senate Floor, CNNPOLITICS (Sept. 1, 2019), <https://www.cnn.com/2019/09/01/politics/democrats-frustrated-mitch-mcconnell-gun-control-senate/index.html> (discussing Democrat frustration with the Republican-lead Senate’s obstruction of gun control legislation).

<sup>163</sup> See Max Smith, *Virginia Legislature Fails to Reach Budget Deal, May Go Into Overtime*, WTOP (Feb. 22, 2019), <https://wtop.com/virginia/2019/02/va-general-assembly-may-go-into-overtime-final-i-81-bills-mean-no-improvements/> (noting a number of key issues that remain unresolved in the Virginia General Assembly).



WHERE YOU STAND DEPENDS ON WHERE THEY SIT:  
EXECUTIVE CRISIS AND LEGISLATIVE LEADERSHIP IN  
VIRGINIA GENERAL ASSEMBLY

*Daniel J. Palazzolo and Thomas H. Little\**

\* Daniel J. Palazzolo, PhD, is a Professor of Political Science at the University of Richmond and Thomas H. Little, PhD, is the Director of Curriculum Development and Research at the State Legislative Leaders Foundation.

## ABSTRACT

*Scandals surrounding the Governor, Lieutenant Governor, and Attorney General within the first month of the 2019 Virginia General Assembly Session disrupted the normal business of the Assembly and threatened to derail the legislative process. The crises forced legislative leaders to convene their party caucuses and publicly state their positions on whether the three statewide elected officials should remain in office. But they lacked either the formal authority or a sufficient consensus to remove any of them from office. Instead, they focused on legislating and positioning their parties for the upcoming November elections. Thus, the crises revealed the essential institutional and political roles of legislative leaders in the Virginia General Assembly.*

## INTRODUCTION

As Kirk Cox, Republican Speaker of the Virginia House of Delegates, and Justin Fairfax, Democratic Lieutenant Governor and presiding officer of the Virginia State Senate, gavelled their respective chambers to order on January 9, 2019,<sup>1</sup> the path forward seemed clear. As expected, the Republican majority would attempt to exert its will and the Democratic minority, with a popular governor at their side, would cooperate when possible and obstruct when necessary. Meanwhile, both parties would try to position themselves for the all-important 2019 elections. Some bills would pass; ...most would not. The Assembly would approve a budget that included most, but not all, of Democratic Governor Ralph Northam's requests. Situation normal.

Then came the fateful and furious days in February that straddled the midpoint of the Assembly session.<sup>2</sup> First, on Friday, February 1, Governor Northam admitted that he was one of two people in a photograph on the page of his medical school yearbook that portrayed a white person colored in blackface standing next to another dressed up as a Ku Klux Klansman.<sup>3</sup> The Governor retracted his admission the following day, only to make matters worse by revealing that he once colored his face to impersonate Michael

<sup>1</sup> *2019 General Assembly Gavels into Session in the House's 400th Year*, NEWSRADIO WINA, <https://wina.com/news/064460-2019-general-assembly-gavels-into-session-in-the-houses-400th-year/> (last visited Sept. 10, 2019).

<sup>2</sup> See generally Alan Blinder & Jonathan Martin, *Governor Admits He Was in Racist Yearbook Photo*, N.Y. TIMES (Feb. 1, 2019), <https://www.nytimes.com/2019/02/01/us/politics/ralph-northam-yearbook-blackface.html> (explaining the controversy surrounding the Virginia Governor's involvement in a racist photo).

<sup>3</sup> *Id.*

Jackson in a dance competition.<sup>4</sup> He was prepared to reenact a version of his best MJ rendition had his wife not counseled him otherwise.<sup>5</sup> By Monday, an alleged victim accused Fairfax of sexual assault during the Democratic National Convention in 1984.<sup>6</sup> By Wednesday, Democratic Attorney General Mark Herring, who had earlier called upon Northam to resign, admitted that he, too, painted his face “brown” while imitating a rapper in college.<sup>7</sup> Situation no longer normal.

While much has been written about how the three executive officials responded to these crises, very little attention has been paid to how legislative leaders—most notably Speaker Cox, Senate Republican Leader Tom Norment, House Democratic Minority Leader Eileen Filler-Corn, and Senate Democratic Leader Richard Saslaw—handled each situation.<sup>8</sup> Yet, given their roles and responsibilities, the actions and choices of legislative leaders were critical to the oversight of the executive, the progress of the General Assembly’s legislative agenda, the constituents they and their members represent, and the political consequences for the upcoming elections. How did the leaders and the institutions they manage react to each crisis, and how did their reactions change as new information became available? How do we explain those reactions? And how, if at all, did the crisis affect the legislative performance of the 2019 Virginia General Assembly?

We observe three patterns of leader responses: (1) a broad bipartisan appeal for Northam to resign from office; (2) differing views both within and across the parties over when Fairfax should resign, and over whether and how the Assembly should investigate his case; and (3) partisan differences over whether Herring should resign. The leaders’ responses depended on the circumstances surrounding each of the three cases, the opinions of their fellow partisans, and their own assessments of their responsibilities as leaders of their respective parties and institutions. With little capacity to force the

<sup>4</sup> Carla Herreria, *Ralph Northam Delivered a Wild Press Conference and Twitter Tore It Apart*, HUFFPOST (Feb. 4, 2019), [https://www.huffpost.com/entry/ralph-northam-press-conference-black-face\\_n\\_5c560876e4b087104753f071](https://www.huffpost.com/entry/ralph-northam-press-conference-black-face_n_5c560876e4b087104753f071).

<sup>5</sup> *Id.*

<sup>6</sup> Daniel Marans, *Virginia Lt. Gov. Again Denies Sexual Assault Allegation, Suggests Political Hit Job*, HUFFPOST (Feb. 4, 2019), [https://www.huffpost.com/entry/justin-fairfax-virginia-sexual-assault-allegation\\_n\\_5c588e9ae4b09293b20730f0](https://www.huffpost.com/entry/justin-fairfax-virginia-sexual-assault-allegation_n_5c588e9ae4b09293b20730f0).

<sup>7</sup> Gregory S. Schneider & Laura Vozzella, *Virginia Attorney General Herring Admits to Wearing Blackface in College*, ROANOKE TIMES (Feb. 6, 2019), [https://www.roanoke.com/news/politics/virginia-attorney-general-herring-admits-to-wearing-blackface-in-college/article\\_587e992a-12f0-535b-9a13-487d8b28ef2a.html](https://www.roanoke.com/news/politics/virginia-attorney-general-herring-admits-to-wearing-blackface-in-college/article_587e992a-12f0-535b-9a13-487d8b28ef2a.html).

<sup>8</sup> See generally Virginian-Pilot Editorial Board, *Editorial: Amid Turmoil, The People’s Work Must Continue*, VIRGINIAN-PILOT (Feb. 8, 2019), [https://www.pilotonline.com/opinion/article\\_207c358c-2b0e-11e9-940b-e7cdb06168d7.html](https://www.pilotonline.com/opinion/article_207c358c-2b0e-11e9-940b-e7cdb06168d7.html) (discussing the ability of Kirk Cox, Eileen Filler-Corn, and Richard Saslaw to guide the legislature following the scandal of Virginia leaders).

governor, lieutenant governor, or the attorney general to vacate their offices,<sup>9</sup> leaders of both parties focused on passing legislation, assuaging their constituents, and putting themselves and their parties in the best position for the upcoming election campaigns. Thus, in spite of the chaos that erupted in the middle of the legislative session, the outcomes of the legislative process were quite normal with debates being held, laws being passed and a budget delivered to and signed by the governor.<sup>10</sup> At least some of that return to normalcy depended on pragmatic leadership in the House and Senate—leadership that we attribute to the institutional and political conditions and the strategic choices of legislative leaders.

#### I. CONTEXT MATTERS: NARROW MARGIN POLITICS, PARTY UNITY, AND CONSTITUTIONAL CONSTRAINTS

We begin with a few general considerations of legislative leadership that will guide our analysis. Legislative leadership depends on the institutional and political context within which leaders operate.<sup>11</sup> Thus, institutional differences between House and Senate norms, rules, and formal powers affect the capacity and roles of legislative leaders. The House is typically more partisan than the Senate,<sup>12</sup> and the House is responsible for impeachment of executive officials whereas the Senate is responsible for trying cases of impeachment.<sup>13</sup> Within each chamber, leadership roles vary by the type of position.<sup>14</sup> For example, the Speaker of the House is a constitutional position that confers both parliamentary<sup>15</sup> and partisan responsibilities, whereas minority and majority party leaders primarily serve the interests of the delegates or senators from their respective parties. Scholars have used principal-agent theory to show that legislative leaders seek to advance the goals and respond

<sup>9</sup> Josh Voorhees, *Can Ralph Northam Be Forced Out?*, SLATE (Feb. 4, 2019), <https://slate.com/news-and-politics/2019/02/northam-blackface-impeachment-constitution.html>.

<sup>10</sup> See generally Gregory S. Schneider & Laura Vozzella, *Amid Sexual Assault Claims and Blackface Scandals, Va. Legislature Wraps Up Session*, WASH. POST (Feb. 24, 2019), <https://beta.washingtonpost.com>

[/local/virginia-politics/amid-sex-assault-and-blackface-scandals-virginia-legislature-wraps-up-strange-session/2019/02/24/0d5de4f2-3859-11e9-a2cd-307b06d0257b\\_story.html](https://beta.washingtonpost.com/local/virginia-politics/amid-sex-assault-and-blackface-scandals-virginia-legislature-wraps-up-strange-session/2019/02/24/0d5de4f2-3859-11e9-a2cd-307b06d0257b_story.html).

<sup>11</sup> For more discussion on the impact institutional and political contexts have on legislative leadership, see DAVID W. ROHDE, *PARTIES AND LEADERS IN THE POSTREFORM HOUSE* 28-29 (Benjamin I. Page ed., 1991); BARBARA SINCLAIR, *LEGISLATORS, LEADERS, AND LAWMAKING* 18 (1995); Joseph Cooper & David W. Brady, *Institutional Context and Leadership Style: The House from Cannon to Rayburn*, 75 AM. POL. SCI. REV. 411, 423 (1981).

<sup>12</sup> Dylan Matthews, *It's Official: The 112th Congress was the Most Polarized Ever*, WASH. POST (Jan. 17, 2013), <https://www.washingtonpost.com/news/wonk/wp/2013/01/17/its-official-the-112th-congress-was-the-most-polarized-ever/?noredirect=on>.

<sup>13</sup> U.S. CONST. art. I, § 2, cl. 5, § 3, cl. 6.

<sup>14</sup> *Id.* § 2, cl. 5, § 5, cl. 1; see also RANDALL STRAHAN, *LEADING REPRESENTATIVES* 7 (2007) (explaining some of the tasks that accompany being a party leader).

<sup>15</sup> See U.S. CONST. art. I, § 2, cl. 5 (creating the Speaker position).

to the opinions of the members who elected them.<sup>16</sup> Leaders have more influence when most or all of their fellow partisans agree, or are unified on an issue;<sup>17</sup> leaders have less influence but perhaps more discretion when fellow partisans are divided.<sup>18</sup> The size of the majority party<sup>19</sup> and electoral competitiveness can also affect leadership influence.<sup>20</sup>

Virginia's legislative leaders were operating within a highly competitive electoral context—recent election results had produced narrow margins in the House and Senate, and majority control in each chamber was at stake in the upcoming 2019 elections.<sup>21</sup> Narrow margins of party control encouraged leaders of both parties to calculate the effects of almost every move on the chances of either holding, in the case of Republicans, or gaining, in the case of the Democrats, majorities in the House and Senate in the upcoming elections. Party unity and bipartisan agreement varied across the three cases. Meanwhile, the Constitution placed constraints on the choices available to the leaders<sup>22</sup> when the three executives refused to resign from their positions.<sup>23</sup> In sum, while the leaders could hardly avoid the media scrutiny surrounding the crises facing the Northam, Fairfax, and Herring, the political and institutional context left the leaders with few options to remove them from office<sup>24</sup> and strong incentives to focus on achieving policy and political goals through the legislative process.

<sup>16</sup> See, e.g., GARY W. COX & MATHEW D. MCCUBBINS, *LEGISLATIVE LEVIATHAN: PARTY GOVERNMENT IN THE HOUSE* 93 (Brian Barry et al. eds., 1993) (discussing “central agents” generally); BARBARA SINCLAIR, *LEGISLATORS, LEADERS, AND LAWMAKING* 9–10 (1995) (concluding that congressional party leaders are agents of their respective parties); Richard A. Clucas, *Principal-Agent Theory and the Power of State House Speakers*, 26 *LEGIS. STUD. Q.* 319, 334 (2001) (concluding that state legislators act as agents of their followers); Christopher Z. Mooney, *Explaining Legislative Leadership Influence: Simple Collective Action or Conditional Explanations?*, 66 *POL. RES. Q.* 559, 568 (2012) (explaining, in a legislative context, that agents look to the principal's proximate goals and problems for direction); David W. Rohde & Kenneth A. Shepsle, *Leaders and Followers in the House of Representatives: Reflections on Woodrow Wilson's Congressional Government*, 14 *CONG. & PRESIDENCY* 111, 117 (1987) (claiming legislative leaders are agents for their partisans).

<sup>17</sup> DAVID W. ROHDE, *PARTIES AND LEADERS IN THE POSTREFORM HOUSE* 14, 16 (1991); BARBARA SINCLAIR, *LEGISLATORS, LEADERS, AND LAWMAKING* 307 (1995).

<sup>18</sup> See RANDALL STRAHAN, *LEADING PARTY REPRESENTATIVES* 7 (2007).

<sup>19</sup> STEVEN S. SMITH, *PARTY INFLUENCE IN CONGRESS* 122–23 (2007).

<sup>20</sup> Richard A. Clucas, *Principal-Agent Theory and the Power of State House Speakers*, 26 *LEGIS. STUD. Q.* 319, 334 (2001).

<sup>21</sup> See Rachel Bitecofer, *High Stakes in Virginia General Assembly Will Preview 2020 Presidential*, CHRISTOPHER NEWPORT U. (Sept. 10, 2019), <https://cnu.edu/wasoncenter/2019/09/10-va-2019-legislative-forecast>.

<sup>22</sup> See VA. CONST. art. IV, § 16 (allowing members of the executive to declare the governor unable to discharge the powers and duties of his office); see also VA. CONST. art. IV, § 17 (commencing impeachment proceedings solely for offenses against the state by malfeasance in office, corruption, neglect of duty, or other high crime or misdemeanor); see also Eli Watkins, *Virginia Speaker Has “Rightful Hesitation” About Impeaching Northam, Highlighting Potential Constitutional Impasse*, CNN (Feb. 4, 2019), <https://www.cnn.com/2019/02/04/politics/virginia-ralph-northam-impeachment/index.html>.

<sup>23</sup> Jonathan Martin, Alan Blinder, & Campbell Robertson, *Justin Fairfax Puts Virginia Democrats in Bind on Impeachment*, N.Y. TIMES (Feb. 9, 2019), <https://www.nytimes.com/2019/02/09/us/politics/justin-fairfax-virginia-impeachment.html>

<sup>24</sup> See VA. CONST. art. IV, § 16; see also VA. CONST. art. IV, § 17; see also Eli Watkins, *Virginia Speaker Has “Rightful Hesitation” About Impeaching Northam, Highlighting Potential Constitutional*



### A. 2017: An Earthquake Election

As the 2017 Virginia elections approached, most agreed the Democratic candidates had the wind at their backs.<sup>25</sup> Approval for Republican President Donald Trump, who won the national election but lost Virginia's electoral votes to Hillary Clinton, was in the high thirties nationally,<sup>26</sup> and low forties in Virginia.<sup>27</sup> After having defeated a more progressive candidate in the Democratic primary, the moderate and well-liked sitting Lieutenant Governor Ralph Northam would be at the top of the party's ticket as candidate for Governor.<sup>28</sup> Fueled by shock, anger and frustration with Trump's election, Democrats fielded candidates in eighty-eight of the state's 100 districts<sup>29</sup> and ran challengers against fifty-four of the sixty Republican incumbents.<sup>30</sup> Moreover, because Virginia was one of only four states holding elections in 2017 and Democrats had the potential to win a large number of seats, money and support poured in from all over the country.<sup>31</sup> Thus, while statewide Democrats saw 2017 as a means to maintain control of the governor's office and make gains in the House,<sup>32</sup> nationally Democrats sought to build a "blue wave" that the party hoped would carry over to the 2018 election.<sup>33</sup>

---

*Impasse*, CNN (Feb. 4, 2019), <https://www.cnn.com/2019/02/04/politics/virginia-ralph-northam-impeachment/index.html>.

<sup>25</sup> See Elena Schneider, *GOP Strategists Worry Incumbents Aren't Ready for a Blue Wave*, POLITICO (Nov. 15, 2017), <https://www.politico.com/story/2017/11/15/midterms-republican-incumbents-blue-wave-244952> (describing this sentiment nationally at the end of 2017).

<sup>26</sup> Tess Berenson, *Donald Trump Wins the 2016 Election*, TIME (Nov. 9, 2016), <https://time.com/4565685/donald-trump-wins/>; *Polls: Election 2016 Favorability Rankings*, REALCLEAR POL., <https://www.realclearpolitics.com/epolls/other/president/clintontrumpfavorability.html> (last visited Sept. 12, 2019); *Va. Election Results 2016*, N.Y. TIMES (Aug. 1, 2017), <https://www.nytimes.com/elections/2016/results/virginia>.

<sup>27</sup> Cameron Easley, *Trump Support Drops in Every State, Though Deep Pockets of Support Remain*, MORNING CONSULT (Oct. 10, 2017), <https://morningconsult.com/2017/10/10/trump-approval-dips-in-every-state-though-deep-pockets-of-support-remain/>.

<sup>28</sup> Gregory S. Schneider, *Northam Wins Democratic Gubernatorial Primary in Va.*, WASH. POST (June 13, 2017), [https://www.washingtonpost.com/local/virginia-politics/and-now-virginia-primary-voters-choose-their-man/2017/06/12/9ff19692-4f94-11e7-b064-828ba60fbb98\\_story.html](https://www.washingtonpost.com/local/virginia-politics/and-now-virginia-primary-voters-choose-their-man/2017/06/12/9ff19692-4f94-11e7-b064-828ba60fbb98_story.html); *Va. Gubernatorial Primary Election, 2017*, BALLOTPEDIA, [https://ballotpedia.org/Virginia\\_gubernatorial\\_primary\\_election\\_2017](https://ballotpedia.org/Virginia_gubernatorial_primary_election_2017) (last visited Sept. 21, 2019).

<sup>29</sup> Cole Gray, *Dems Look to Gain Ground in Va. House of Delegates*, HILL (Nov. 11, 2017), <https://thehill.com/homenews/campaign/359002-dems-look-to-gain-ground-in-va-house-of-delegates>

<sup>30</sup> Joan Walsh, *Here's Why Democrats Won Big in Va.*, NATION (Nov. 8, 2017), <https://www.thenation.com/article/heres-why-democrats-won-big-in-virginia/>.

<sup>31</sup> See Edward-Isaac Dovere, *The Democrats' Secret Weapon to Take Back Statehouses*, POLITICO (Feb. 10, 2018), <https://www.politico.com/story/2018/02/10/democrats-special-elections-organizing-401365> (discussing the large number of national volunteers at the Virginia House of Delegates in 2017 and the "burst of voter interest and money").

<sup>32</sup> See Daniel Marans, *How the Democrats Won Big in the Va. House – And Why It Matters*, HUFFPOST (Nov. 8, 2017), [https://www.huffpost.com/entry/democrats-back-virginia-house-of-delegates\\_n\\_5a024a75e4b092053058c616](https://www.huffpost.com/entry/democrats-back-virginia-house-of-delegates_n_5a024a75e4b092053058c616) (discussing how Virginia's 2017 election was pivotal to the Democratic Party gaining power).

<sup>33</sup> See Nathaniel Rakich, *Democrats Are Overperforming in Special Elections Almost Everywhere*, FIFTYTHREEEIGHT (June 5, 2017), <https://fiftythreeeight.com/features/democrats-are-overperforming-in->

A blue wave, stronger than even the most optimistic Democrat could have expected, did indeed hit the Old Dominion in 2017.<sup>34</sup> Going into the election, Republicans held a thirty-two-seat majority (66R-34D).<sup>35</sup> Democrats believed a gain of 6-8 seats would be a “success.”<sup>36</sup> Instead, Democratic candidates received almost ten percent (53.2% to 43.8%) more votes statewide than their GOP counterparts<sup>37</sup> and picked up a surprising fifteen seats.<sup>38</sup> In fact, the only thing that separated Democrats from a share of the House majority was a tie in the 94th House District: 11,608 votes each for Republican incumbent David Yancey and Democratic challenger Shelly Simonds.<sup>39</sup>

#### A. 2018: A New World in the Old Dominion

In accordance with state law, the winner of a tied election is chosen by chance.<sup>40</sup> Thus, on January 4, 2018, two film canisters were placed in a bowl—one containing the name of Yancey, the other of Simonds.<sup>41</sup> The chosen canister would not only determine which candidate would represent House District 94, but which party would control the Virginia House of Delegates.<sup>42</sup> If Yancey’s name was selected, Republicans would maintain their majority, by two seats (51R-49D).<sup>43</sup> If Simonds’ name was drawn, Democrats and Republicans would each hold fifty seats, and the parties would need to negotiate a power sharing agreement.<sup>44</sup> Yancey got lucky and so did the Republicans, retaining the majority they have held since 2000, while Democrats remained the minority party,<sup>45</sup> albeit by the slimmest of margins. In the

special-elections-almost-everywhere/ (“If nothing else, 2017’s legislative elections so far put Democrats on track to make big gains in statehouses across the country in 2018...”).

<sup>34</sup> Kyle Kondick & Geoffrey Skelly, *Democrats Domination in the Old Dominion*, SABATO’S CRYSTAL BALL (Nov. 9, 2017), <http://www.centerforpolitics.org/crystalball/articles/democratic-domination-in-the-old-dominion/>.

<sup>35</sup> Joan Walsh, *Here’s Why Democrats Won Big in Va.*, NATION (Nov. 8, 2017), <https://www.thenation.com/article/heres-why-democrats-won-big-in-virginia/>.

<sup>36</sup> Daniel Marans & Sam Levin, *Democrats Are Terrified of Losing Virginia’s Big Election. They Should Be.*, HUFFPOST (Nov. 6, 2017), [https://www.huffpost.com/entry/democrats-terrified-of-losing-virginia-governor-race\\_n\\_5a00afe6e4b0c96530017bfd](https://www.huffpost.com/entry/democrats-terrified-of-losing-virginia-governor-race_n_5a00afe6e4b0c96530017bfd); *id.*

<sup>37</sup> Emile Schepers, *Virginia General Assembly Starts 2018 Session with Push for Progressive Laws*, PEOPLE’S WORLD (July 16, 2018), <https://www.peoplesworld.org/article/virginia-general-assembly-starts-2018-session-with-push-for-progressive-laws/>.

<sup>38</sup> *See id.*

<sup>39</sup> Kevin Robillard, *Republican Wins Drawing to Decide Control of Virginia Statehouse*, POLITICO (Jan. 4, 2018), <https://www.politico.com/story/2018/01/04/xxxx-wins-drawing-to-decide-control-of-virginia-statehouse-324024>.

<sup>40</sup> VA. CODE § 24.2-674 (2019).

<sup>41</sup> Robillard, *supra* note 39.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Republicans in Virginia Warn Against Delay in Settling Election*, KIMT (Dec. 31, 2017), <https://www.kimt.com/content/national/467155263.html>.

<sup>45</sup> Laura Vozella, *A Rare, Random Drawing Helped Republicans Win a Tied Virginia Election, but It May Not End There*, WASH. POST (Jan. 4, 2018), <https://www.washingtonpost.com/local/virginia->

Senate, which did not hold elections, Republicans maintained a two-seat majority (21R-19D) as they have since 2012.<sup>46</sup>

In addition to large minorities in both chambers, Democrats celebrated Northam's decisive victory (54-45%) for Governor over Republican candidate Ed Gillespie, in which he garnered the largest number of gubernatorial votes in an election with the largest voter turnout in decades.<sup>47</sup> Governor Northam maintained popular support during his first year in office; his 48 percent approval (compared to twenty-six percent disapproval) was best among all first term governors.<sup>48</sup> Meanwhile, House Republicans were undergoing a transition; a newly elected Speaker Cox would replace longtime Speaker Bill Howell, who presided over both the largest gains and the largest losses in House seats in the party's history.<sup>49</sup> Although Cox had 28 years of experience and served in key committee leadership posts, he faced his first test in the Speaker's chair. Recognizing the new strength of the minority party, in taking the gavel, Cox struck a bipartisan note claiming, "We are not two parties. We are one House. Tasked with the responsibility of governing one commonwealth."<sup>50</sup>

Nevertheless, Democrats were anxious to flex their newfound muscles in the House of Delegates, where most of the large class of newcomers ran on a progressive platform—expanding Medicaid, protecting the rights of the LGBT community, and improving the economy for all.<sup>51</sup> The House

---

politics/republican-yancey-picked-in-random-lottery-declared-winner-of-pivotal-va-house-race/2018/01/04/9c9caa5a-f0a1-11e7-b390-a36dc3fa2842\_story.html.

<sup>46</sup> *Virginia State Senate*, BALLOTEDIA, [https://ballotpedia.org/Virginia\\_State\\_Senate](https://ballotpedia.org/Virginia_State_Senate) (last visited Sept. 22, 2019).

<sup>47</sup> Will Houpp, *Northam-Gillespie Race Had the Highest Turnout in 2 Decades for Virginia Governor Election*, VIRGINIAN-PILOT (Nov. 10, 2017), [https://www.pilotonline.com/government/local/article\\_dbd28728-19f1-5da7-a25a-7195dfd9e37d.html](https://www.pilotonline.com/government/local/article_dbd28728-19f1-5da7-a25a-7195dfd9e37d.html); Michael Lavers, *Northam, Herring and Fairfax Win in Va.*, WASH. BLADE (Nov. 8, 2017), <https://www.washingtonblade.com/2017/11/08/northam-herring-and-fairfax-win-in-va/>.

<sup>48</sup> Michael Burke, *Poll: Northam Approval Plummets After Blackface Photo Emerges*, HILL (Feb. 4, 2019), <https://thehill.com/homenews/state-watch/428391-poll-northam-approval-plummets-after-blackface-photo-emerges>.

<sup>49</sup> Graham Moomaw, *Virginia House Speaker Bill Howell Hospitalized After Emergency Heart Surgery*, RICH. TIMES-DISPATCH (Jan. 3, 2018), [https://www.richmond.com/news/local/government-politics/virginia-house-speaker-bill-howell-hospitalized-after-emergency-heart-surgery/article\\_464fd034-fb18-558a-bf9f-6ea244fb187c.html](https://www.richmond.com/news/local/government-politics/virginia-house-speaker-bill-howell-hospitalized-after-emergency-heart-surgery/article_464fd034-fb18-558a-bf9f-6ea244fb187c.html); Haley Winn, *Kirk Cox to Succeed Bill Howell as Virginia House Speaker*, INSIDENOVA (Feb. 21, 2017), [https://www.insidenova.com/headlines/kirk-cox-to-succeed-bill-howell-as-virginia-house-speaker/article\\_8113f032-f88f-11e6-8e13-5f6bc4d8ca96.html](https://www.insidenova.com/headlines/kirk-cox-to-succeed-bill-howell-as-virginia-house-speaker/article_8113f032-f88f-11e6-8e13-5f6bc4d8ca96.html).

<sup>50</sup> Graham Moomaw, *Kirk Cox Elected Va. House Speaker as Republicans Take 51-49 Majority into Sessions First Day*, RICH. TIMES-DISPATCH (Jan. 10, 2018), [https://www.richmond.com/news/virginia/government-politics/general-assembly/kirk-cox-elected-va-house-speaker-as-republicans-take-/article\\_67cea5c9-9efd-5fb2-89fd-d9003da98362.html](https://www.richmond.com/news/virginia/government-politics/general-assembly/kirk-cox-elected-va-house-speaker-as-republicans-take-/article_67cea5c9-9efd-5fb2-89fd-d9003da98362.html).

<sup>51</sup> See Armando Trull & Lara McCoy, *Northern Virginia's New Delegates Reflect the Diversity of the Region*, WAMU (Nov. 10, 2017), <https://wamu.org/story/17/11/10/northern-virginias-new-delegates-reflect-diversity-region/>.

Democratic Caucus added eleven women (bringing the total to twenty-three women, or forty-five percent of the caucus), including the chamber's first two Latina members, its first transgender member, its first Asian-American female, its first openly lesbian member, and an avowed Socialist.<sup>52</sup> Members of the new class of Democrats did not disappoint the progressive base of the party.<sup>53</sup> In the opening weeks of the 2018 session, for example, they introduced bills to reform prisons,<sup>54</sup> expand Medicaid, reform the election process, increase the number of ID's accepted for voter verification, raise the state's minimum wage, ratify the Equal Rights Amendment, and the restore of the right to vote for ex-felons who completed their sentences.<sup>55</sup>

Not surprisingly, most of these bills did not see the light of day in the Republican-controlled House.<sup>56</sup> As one Republican Delegate noted, "Majority means majority,"<sup>57</sup> even if only by two votes. Nevertheless, all was not lost. The increased Democratic numbers forced the Republican majority to work closely with Governor Northam, which led to the passage of Medicaid expansion and significant legislation regarding regulatory reform, criminal justice, and consumer protection.<sup>58</sup> In addition, the robust minority prevented the legislature from overriding Governor's vetoes on numerous bills, including of legislation to repeal gun bans in churches.<sup>59</sup>

<sup>52</sup> Marans, *supra* note 32; Patrick Wilson, *Women, Minorities, LGBTQ People - and a Democratic Socialist - Will Change the Face of Virginia's House*, RICH. TIMES-DISPATCH (Nov. 8, 2017), [https://www.richmond.com/news/local/government-politics/women-minorities-lgbtq-people---and-a-democratic-socialist/article\\_cd5950f7-bed8-52cc-a119-5553d7c15f3c.html](https://www.richmond.com/news/local/government-politics/women-minorities-lgbtq-people---and-a-democratic-socialist/article_cd5950f7-bed8-52cc-a119-5553d7c15f3c.html).

<sup>53</sup> See generally Schepers, *supra* note 37 (describing the progressive push of legislation upon the new members' arrival).

<sup>54</sup> See Sandy Hausman, *A Growing Call for Criminal Justice Reform*, WVTF (May 3, 2019), <https://www.wvtf.org/post/growing-call-criminal-justice-reform#stream/0> (stating that several proposed reforms failed).

<sup>55</sup> Schepers, *supra* note 37.

<sup>56</sup> Graham Moomaw, *After Thrills of Wave Election, Virginia's Freshman Democrats See Most of Their Bills Die in GOP-Controlled House*, RICH. TIMES-DISPATCH (Feb. 17, 2018), [https://www.richmond.com/news/virginia/government-politics/general-assembly/after-thrills-of-wave-election-virginia-s-freshmen-democrats-see/article\\_dc818bf6-fbd-5018-ba20-b009f10b63e6.html](https://www.richmond.com/news/virginia/government-politics/general-assembly/after-thrills-of-wave-election-virginia-s-freshmen-democrats-see/article_dc818bf6-fbd-5018-ba20-b009f10b63e6.html).

<sup>57</sup> *Id.*

<sup>58</sup> See Jake Burns, *Virginia Democrats, Republicans Reach Deal on Criminal Justice Reform*, CBS6 (Feb. 8, 2018), <https://wtvr.com/2018/02/08/virginia-criminal-justice-reform-package/>; *More Than 1,200 Regulations Identified for Elimination Under 2018 Regulatory Reform Bill*, VA. HOUSE GOP (Oct. 26, 2018), <https://virginiahouse.gop/2018/10/26/more-than-1200-regulations-identified-for-elimination-under-2018-regulatory-reform-bill/>; *New Virginia Laws July 2019*, CHARLOTTESVILLE SOLUTIONS (July 1, 2019), <https://charlottesvillesolutions.com/new-virginia-laws-july-2019/>; Laura Vozzella & Gregory S. Schneider, *Virginia General Assembly Approves Medicaid Expansion to 400,000 Low-Income Residents*, WASH. POST (May 30, 2018), [https://www.washingtonpost.com/local/virginia-politics/virginia-senate-approves-medicaid-expansion-to-400000-low-income-residents/2018/05/30/5df5e304-640d-11e8-a768-ed043e33f1dc\\_story.html](https://www.washingtonpost.com/local/virginia-politics/virginia-senate-approves-medicaid-expansion-to-400000-low-income-residents/2018/05/30/5df5e304-640d-11e8-a768-ed043e33f1dc_story.html).

<sup>59</sup> Jordan Pascale, *GOP General Assembly Can't Override Governor's Vetoes of Sanctuary Cities, 9 Other Bills*, VIRGINIAN-PILOT (Apr. 18, 2018), [https://www.pilotonline.com/government/virginia/article\\_d9f6b8d8-433e-11e8-bcc4-c31c50459006.html](https://www.pilotonline.com/government/virginia/article_d9f6b8d8-433e-11e8-bcc4-c31c50459006.html); Christian Robinson, *Bill Legalizing Weapons in Places of Worship Fails in Virginia House*, WHSV3 (Feb. 25, 2019), <https://www.whsv.com/content/news/Church-leaders-react-to-weapons-bill-504679352.html>.

*B. 2019: A Trifecta of Crises for Democrats and an Opportunity for Republicans*

Going into the 2019 session, Democrats seemed poised to build on increased electoral momentum and further influence public policy as they had a year earlier. The Blue Wave began with the House of Delegates and Governor's race in 2017 and continued into the 2018 congressional elections.<sup>60</sup> This time, three female Democratic candidates defeated Republican incumbents, enabling Democrats to flip the majority of the House delegation from Republican to Democrat for the first time since 2011.<sup>61</sup> In Richmond, Governor Northam played a key role in setting the legislative agenda and influenced negotiations over the budget.<sup>62</sup> Moreover, Democrats had a balanced leadership team in the Assembly. On the Senate side, 78-year-old Richard Saslaw was midway through his eleventh two-year term as Democratic Leader.<sup>63</sup> He was first elected to the House of Delegates in 1975 and to the Senate four years later, where he has served his northern Virginia District constituents ever since.<sup>64</sup> Saslaw had a moderate voting record compared with most Democrats, with legislative support scores of 67% from the Virginia Chapter Sierra Club,<sup>65</sup> 82% from the Virginia League of Conservation,<sup>66</sup> and 25.6% from the conservative Middle Resolution scorecard.<sup>67</sup> By contrast, the averages for all Senate Democrats were about 90%, 89% and

<sup>60</sup> See Josh Reyes, *Democrats Push for Blue State Legislature at Annual Scott Labor Day Picnic*, DAILY PRESS (Sept. 3, 2019), <https://www.dailypress.com/government/virginia/dp-nw-bobby-scott-labor-day-picnic-newport-news-20190903-cahzhztovh5tctxgmtvtpuqiq-story.html>.

<sup>61</sup> Alex Guillén & David Cohen, *2018 Midterms: Incumbents Who Lost*, POLITICO (Nov. 6, 2018), <https://www.politico.com/story/2018/11/06/2018-midterm-election-results-incumbents-967438>; see Lindsey McPherson, *Most House Democrats Will Be In Majority for the First Time Ever*, ROLL CALL (Nov. 13, 2018), <https://www.rollcall.com/news/politics/house-democrats-next-congress-will-majority-first-time-ever>.

<sup>62</sup> See Laura Vozzella & Gregory S. Schneider, *Va. Gov. Northam Urges Republicans to Embrace Ambitious Budget in Annual Address*, WASH. POST (Jan. 9, 2019), [https://www.washingtonpost.com/local/virginia-politics/northam-urges-republicans-to-embrace-ambitious-budget-in-annual-address/2019/01/09/d8b4df4e-1396-11e9-803c-4ef28312c8b9\\_story.html](https://www.washingtonpost.com/local/virginia-politics/northam-urges-republicans-to-embrace-ambitious-budget-in-annual-address/2019/01/09/d8b4df4e-1396-11e9-803c-4ef28312c8b9_story.html).

<sup>63</sup> See SUSAN C. SCHAAR, CLERK'S OFFICE OF THE SENATE OF VA., MANUAL OF THE SENATE: GENERAL ASSEMBLY OF VIRGINIA 2018-2019 107 (2018-2019 ed.).

<sup>64</sup> *Id.*; *Historical Elections Database*, VA. DEP'T ELECTIONS, [https://historical.elections.virginia.gov/elections/search/year\\_from:1979/year\\_to:1979/office\\_id:9/district\\_id:27298/stage:General](https://historical.elections.virginia.gov/elections/search/year_from:1979/year_to:1979/office_id:9/district_id:27298/stage:General) (last visited Sept. 15, 2019); *1975 House of Delegates General Election: District 19, Historical Elections Database*, VA. DEP'T ELECTIONS, <https://historical.elections.virginia.gov/elections/view/48512/> (last visited Sept. 15, 2019).

<sup>65</sup> *Virginia Chapter General Assembly Climate & Energy Scorecard 2018*, SIERRA CLUB, [https://www.sierraclub.org/sites/www.sierraclub.org/files/sce/virginia-chapter/documents/2018Scorecard\\_2.pdf](https://www.sierraclub.org/sites/www.sierraclub.org/files/sce/virginia-chapter/documents/2018Scorecard_2.pdf) (last visited Sept. 15, 2019).

<sup>66</sup> *2018 Virginia General Assembly Conservation Scorecard*, VA. LEAGUE CONSERVATION VOTERS, [https://valcv.org/wp-content/uploads/2018/06/2018-Conservation-Scorecard\\_FINAL-1.pdf](https://valcv.org/wp-content/uploads/2018/06/2018-Conservation-Scorecard_FINAL-1.pdf) (last visited Sept. 15, 2019).

<sup>67</sup> *2018 General Assembly Scorecard*, MIDDLE RESOL., <https://static1.squarespace.com/static/55353081e4b0c39656d85b33/t/5b482daf0e2e72dcce27a910/1531456959220/Middle+Resolution+Scorecard+Final.pdf> (last visited Sept. 15, 2019).

18% respectively.<sup>68</sup> Meanwhile, House Democrats elected progressive female leader, Eileen Filler-Corn as their minority leader.<sup>69</sup> Filler-Corn, first elected to the House of Delegates in 2010, defeated four other Democrats in a hotly contested race for the post.<sup>70</sup> The first woman to lead either legislative caucus in the four-hundred-year history of the Commonwealth of Virginia, she brought considerable credentials as a voice of the most liberal members of the party, having scored 100% on the Virginia Chapter of the Sierra Club and the Virginia League of Conservation, and just 10.1% on the Middle Resolution scorecard.<sup>71</sup>

Suddenly, a series of events threw Democrats into a tailspin. With the revelation of Northam's yearbook page on February 1,<sup>72</sup> the accusations against Fairfax two days later,<sup>73</sup> and Herrings' admission and apology a few days after that,<sup>74</sup> the Democrats hit a trifecta of crises. The wind that had been at the back of the Democratic caucuses was suddenly a gale force wind blowing in the other direction. The storm threatened their chances of building on the previous year's legislative success, and of achieving the ultimate goal: unified Democratic control of Virginia's government following the 2019 elections. Meanwhile, Republicans had an opportunity to recover from the torrent of losses the party suffered in the wake of Trump.

<sup>68</sup> See *id.*; 2018 Virginia General Assembly Conservation Scorecard, *supra* note 66; Virginia Chapter General Assembly Climate & Energy Scorecard 2018, *supra* note 65. Further, Saslaw has been a consistent advocate for capital punishment, a position shared by few in his caucus. See Patrick Wilson, *Va. Senate Passes Bill to Bar Death Penalty for Seriously Mentally Ill*, RICH. TIMES-DISPATCH (Jan. 17, 2019), [https://www.richmond.com/news/virginia/government-politics/general-assembly/va-senate-passes-bill-to-bar-death-penalty-for-seriously/article\\_c3aa7391-2406-5b91-924d-f6be819deebd.html](https://www.richmond.com/news/virginia/government-politics/general-assembly/va-senate-passes-bill-to-bar-death-penalty-for-seriously/article_c3aa7391-2406-5b91-924d-f6be819deebd.html). In the May 2019 Primary, Senator Saslaw faced his first primary opponent in four decades, beating young progressive human right attorney Yasmine Taeb by just a few hundred votes despite outspending her 10-1. See Antonio Olivo, *Challenge from the Left: Moderate Democrats in Va. Under Fire from Liberals*, WASH. POST (Mar. 16, 2019), [https://beta.washingtonpost.com/local/virginia-politics/challenge-from-the-left-moderate-democrats-in-va-under-fire-from-progressives/2019/03/16/0edb6a9e-450a-11e9-8aab-95b8d80a1e4f\\_story.html](https://beta.washingtonpost.com/local/virginia-politics/challenge-from-the-left-moderate-democrats-in-va-under-fire-from-progressives/2019/03/16/0edb6a9e-450a-11e9-8aab-95b8d80a1e4f_story.html).

<sup>69</sup> See Gregory S. Schneider, *A 400-Year First: Filler-Corn Breaks Many Barriers as New Democratic Leader in Virginia's House*, WASH. POST (Jan. 2, 2019), [https://beta.washingtonpost.com/local/virginia-politics/a-400-year-first-filler-corn-breaks-many-barriers-as-new-democratic-leader-in-virginias-house/2018/12/27/b9322b14-0472-11e9-b5df-5d3874f1ac36\\_story.html](https://beta.washingtonpost.com/local/virginia-politics/a-400-year-first-filler-corn-breaks-many-barriers-as-new-democratic-leader-in-virginias-house/2018/12/27/b9322b14-0472-11e9-b5df-5d3874f1ac36_story.html).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*; 2018 General Assembly Scorecard, *supra* note 67; 2018 Virginia General Assembly Conservation Scorecard, *supra* note 66; Virginia Chapter General Assembly Climate & Energy Scorecard 2018, *supra* note 65.

<sup>72</sup> Dylan Scott, *Virginia Governor's 1984 Yearbook Page Features People in Blackface and KKK Hood*, VOX (Feb. 2, 2019), <https://www.vox.com/policy-and-politics/2019/2/1/18207433/ralph-northam-eastern-virginia-medical-school-yearbook-xxx-blackface>.

<sup>73</sup> Theresa Varga, *Va Lt. Gov. Justin Fairfax Denies Sex Assault Allegations From 2004*, WASH. POST (Feb. 4, 2019), [https://www.washingtonpost.com/local/va-lt-gov-justin-fairfax-denies-sex-assault-allegation-from-2004/2019/02/04/05fb0f6c-272b-11e9-ad53-824486280311\\_story.html?utm\\_term=.a8aac-dead1fa](https://www.washingtonpost.com/local/va-lt-gov-justin-fairfax-denies-sex-assault-allegation-from-2004/2019/02/04/05fb0f6c-272b-11e9-ad53-824486280311_story.html?utm_term=.a8aac-dead1fa).

<sup>74</sup> Patrick Wilson & Graham Moomaw, *Virginia Attorney General Mark Herring Admits to Wearing Blackface at College Party in 1980*, RICH. TIMES-DISPATCH (Feb. 6, 2019), [https://www.richmond.com/news/virginia/government-politics/virginia-attorney-general-mark-herring-admits-to-wearing-blackface-at/article\\_67320de2-a377-5aaa-bd43-5f80f29e5c44.html](https://www.richmond.com/news/virginia/government-politics/virginia-attorney-general-mark-herring-admits-to-wearing-blackface-at/article_67320de2-a377-5aaa-bd43-5f80f29e5c44.html).

With the leadership crises unfolding in three Executive offices, legislative leaders of both parties evaluated the circumstances of each case, reflected the positions of their fellow partisans, and focused attention on legislating.

## II. GOVERNOR NORTHAM MUST RESIGN: BIPARTISAN RESPONSE

The circumstances surrounding Northam's yearbook photo and his handling of the debacle caused a broad range of elected officials, party organizations, and interest groups to call for his resignation.<sup>75</sup> The initial response was swift and bipartisan, though notably Republican leaders waited for the Democrats to act first.<sup>76</sup> Within 24 hours of the release of the photo, leaders of the Virginia Black Legislative Caucus, the House Democratic Caucus and the Senate Democratic Caucus demanded the governor step down.<sup>77</sup> The statement released by the House Democratic Caucuses reflects the painful conflict created by the allegation: "We are so deeply saddened by the news that has been revealed today. We regret to say that we are no longer confident in the Governor's representation of Virginians. Though it brings us no joy to do so, we must call for Governor Northam's resignation."<sup>78</sup> Senate Democratic Leader Saslaw, after initially defending Northam concurred: "After a conversation with my colleagues, the Virginia Senate Caucus calls on Governor Northam to resign."<sup>79</sup>

Once it became clear that Northam was not going to resign, the Democrats had another choice to make. Do they stand by him, push for impeachment, or work (either with or without the Governor) to advance the party's legislative interests? Only a few Democrats were willing to stand by Northam,<sup>80</sup> and the Virginia Constitution did not seem to supply a remedy for his removal or impeachment under the circumstances.<sup>81</sup> Unless the

<sup>75</sup> For a record of statements from elected officials, organizations, and groups, see Washington Post Staff, *'He Should Step Down': Racist Photo Sparks Near-Universal Calls for Northam to Resign*, WASH. POST (Feb. 2, 2019) [https://beta.washingtonpost.com/local/virginia-politics/shocked-saddened-and-offended-swift-reaction-to-va-gov-ralph-northams-racist-photo/2019/02/01/ee319196-269c-11e9-ad53-824486280311\\_story.html](https://beta.washingtonpost.com/local/virginia-politics/shocked-saddened-and-offended-swift-reaction-to-va-gov-ralph-northams-racist-photo/2019/02/01/ee319196-269c-11e9-ad53-824486280311_story.html).

<sup>76</sup> See Blinder & Martin, *supra* note 2.

<sup>77</sup> *Id.*; Doug Stanglin, *Democratic Party of Virginia Wants Lt. Gov. Justin Fairfax Out Amid Sexual Assault Claims*, USA TODAY (Feb. 9, 2019), <https://www.usatoday.com/story/news/nation/2019/02/09/virginia-black-caucus-dem-lawmakers-call-lt-gov-resign/2822167002/>.

<sup>78</sup> Dan Meria, *Pressure Intensifies on Northam to Resign as Key Allies Pull Their Support*, CNN (Feb. 2, 2019), <https://www.cnn.com/2019/02/01/politics/democrats-call-on-northam-to-resign/index.html>.

<sup>79</sup> Elham Khatami, *Dick Saslaw Was the Lone VA Democrat to Rush to Northam's Defense. It Could Cost Him Re-Election*, THINKPROGRESS (Feb. 3, 2019), <https://thinkprogress.org/dick-saslaw-was-the-lone-va-democrat-to-rush-to-northams-defense-it-could-cost-him-re-election-ef26e7fb958a/>.

<sup>80</sup> For example, Northam's closest Democratic ally was Senator Chap Petersen. Chap Petersen, *Why I Am Not Calling for the Resignation of Northam or Fairfax*, BLUEVIEW (Apr. 22, 2019), <http://blueview.org/2019/04/22/why-i-am-not-calling-for-the-resignation-of-northam-or-fairfax/>.

<sup>81</sup> Voorhees, *supra* note 9.

2019] WHERE YOU STAND DEPENDS ON WHERE THEY SIT

35

Governor himself decided that “he is unable to discharge the powers and duties of his office...” (Article V, Section 16), which Northam obviously was not prepared to do, the Virginia Constitution alternatively permits two ways to remove the Governor.<sup>82</sup> The first is if “the Attorney General, the President pro tempore of the Senate, and the Speaker of the House of Delegates, or a majority of the total membership of the General Assembly...” determine that “the Governor is unable to discharge the powers and duties of his office”<sup>83</sup> (Article V, Section 16). The other option is impeachment, which begins with the House of Delegates’ consent, and removal from office, pending a trial in the Senate, which requires a two-thirds Senate majority<sup>84</sup> (Article IV, Section 17). The principle basis for impeachment is “offending against the Commonwealth by malfeasance in office, corruption, neglect of duty, or other high crime or misdemeanor.”<sup>85</sup>

Neither of these two removal methods seemed plausible. In the first instance, the *prima facie* case that the Governor could not discharge the powers and duties of the office was quite weak. Executives tend to persist despite claims that they have embarrassed themselves, offended others, lacked “moral authority,” and the like. Moreover, the foremost authority on the Virginia Constitution, A. E. Dick Howard, suggested that although a broad interpretation of the Constitution might allow for the argument that the Governor was not able to discharge the powers and duties, this clause of the Constitution was intended for officials who suffered from physical and/or mental disabilities.<sup>86</sup>

According to Minority Leader Filler-Corn, the Democratic Caucus never seriously considered impeachment and “while the photo was difficult to process, there’s work to be done.”<sup>87</sup> Thus, when asked publicly, Democratic leaders continued for several days to call for Northam to resign, but ultimately they turned their attention to legislative business.<sup>88</sup>

---

<sup>82</sup> VA. CONST. art. V, § 16.

<sup>83</sup> *Id.*

<sup>84</sup> VA. CONST. art. V, § 17.

<sup>85</sup> *Id.*

<sup>86</sup> Andrew Cain, *Could Three State Leaders Oust a Governor Under the Virginia Constitution?*, DAILY PROGRESS (Feb. 2, 2019), [https://www.dailyprogress.com/news/state/could-three-state-leaders-oust-a-governor-under-the-virginia/article\\_2deb65f4-2757-11e9-b36c-0b8c2ff9beaa.html](https://www.dailyprogress.com/news/state/could-three-state-leaders-oust-a-governor-under-the-virginia/article_2deb65f4-2757-11e9-b36c-0b8c2ff9beaa.html).

<sup>87</sup> Telephone Interview with Eileen Filler-Corn, House Minority Leader, Va. House of Delegates (July 17, 2019); see Marie Albiges, *Fellow Democrats Called for Northam to Resign. Now Many are Taking His Money*, DAILY PRESS (June 17, 2019), <https://www.dailypress.com/virginia/dp-nws-northam-campaign-donations-20190614-story.html>.

<sup>88</sup> See Gregory S. Schneider et al., *Northam Meets with Senior Staff and Considers Options, Including Resignation*, WASH. POST (Feb. 3, 2019), [https://www.washingtonpost.com/local/virginia-politics/pressure-mounts-for-northam-to-resign-as-allies-press-him-on-national-tv/2019/02/03/572f4538-27c1-11e9-b2fc-721718903bfc\\_story.html?utm\\_term=.304c42a07dea](https://www.washingtonpost.com/local/virginia-politics/pressure-mounts-for-northam-to-resign-as-allies-press-him-on-national-tv/2019/02/03/572f4538-27c1-11e9-b2fc-721718903bfc_story.html?utm_term=.304c42a07dea).



Since Republican delegates and senators were generally unified, party leaders essentially voiced the preference widely shared by their fellow partisans.<sup>89</sup> Indeed, the questions were not whether Northam should resign, but when to make the announcement and what message to include in it.<sup>90</sup> Initially, the circumstances warranted a firm but cautious message. On Friday evening House and Senate leaders—Speaker Cox and House Majority Leader Todd Gilbert, Majority Leader Norment and Senate Rules Committee Chair Ryan McDougle—issued a joint statement: “This is a deeply disturbing and offensive photograph in need of an immediate explanation by the governor.”<sup>91</sup> The next day GOP Senate leaders took a different approach than their House counterparts, though both House and Senate leaders called for Northam’s resignation.<sup>92</sup>

On Saturday morning, February 2, after several Democratic organizations called for Northam’s resignation and before his news conferences, several Republican Senate leaders (Norment, McDougle, and Caucus Co-Chairman Mark D. Obenshain) stated: “The confidence of the people is essential to a governor being able to serve effectively. It is clear to us that Governor Northam no longer holds that confidence.” Thus, in spite of his many contributions to “serve the Commonwealth,” resignation from office was the only way “to fulfill his duty and act in the best interests of Virginia.”<sup>93</sup>

House Republican leaders (Cox, Gilbert, GOP Caucus chair Tim Hugo and Majority Whip Nick Rush) explained the timing of their announcement, directly associated their remarks with the Black Caucus, and noted both a lack of public confidence and inability to lead:

When the racist picture first emerged Friday, we were shocked and repulsed. The photo is disturbing and offensive, as unacceptable in 1984 as it is today. We withheld

<sup>89</sup> See Daniel Berti, *Gov. Northam's Yearbook Scandal — A Timeline of Events*, PATRIOT, <https://pcpatriot.com/gov-northams-yearbook-scandal-a-timeline-of-events/> (last visited Sept. 23, 2019); *id.* Republican Senator Richard Stuart, however, publicly supported Northam, and a few other Republicans silently opposed his resignation. See *Virginia Governor Considers Calls for his Resignation*, WASH. POST (Feb. 5, 2019), [https://www.washingtonpost.com/lifestyle/kidspost/virginia-governor-considers-calls-for-his-resignation/2019/02/05/3be190fe-298a-11e9-b2fc-721718903bfc\\_story.html?noredirect=on](https://www.washingtonpost.com/lifestyle/kidspost/virginia-governor-considers-calls-for-his-resignation/2019/02/05/3be190fe-298a-11e9-b2fc-721718903bfc_story.html?noredirect=on) (noting that after a “barrage of calls for his resignation from [Northam’s] own party,” Republican “state Senator Richard Stuart issued a statement of support, becoming the first Republican lawmaker to do so”).

<sup>90</sup> See generally Schneider et al., *supra* note 88 (discussing different political groups’ calls for Northam’s resignation).

<sup>91</sup> Marie Albiges et al., *Ralph Northam Admits He’s in “Clearly Racist” Photo; Vows to Serve Out Term Amid Calls for Resignation*, VIRGINIAN-PILOT (Feb. 1, 2019), [https://pilotonline.com/news/government/politics/virginia/article\\_67fdd682-2662-11e9-a7d1-c7ed70e09b50.html](https://pilotonline.com/news/government/politics/virginia/article_67fdd682-2662-11e9-a7d1-c7ed70e09b50.html).

<sup>92</sup> See Schneider et al., *supra* note 88 (discussing Republicans leaders calls for Northam’s resignation).

<sup>93</sup> *Statement of Senate Republican Leaders*, VA. SENATE REPUBLICAN CAUCUS (Feb. 2, 2019), <https://www.senators4va.com/articles/statement-senate-republican-leaders>.

2019] WHERE YOU STAND DEPENDS ON WHERE THEY SIT

37

judgement [sic] last night while awaiting an explanation from the Governor believing the gravity of the situation deserved prudence and deliberation. We agree with the powerful words of our colleagues in the Virginia Legislative Black Caucus and believe that because of this photo the Governor has lost the confidence of the citizens he serves. While we respect the Governor's lifetime of service, his ability to lead and govern is permanently impaired and the interests of the Commonwealth necessitate his resignation.<sup>94</sup>

Whether Northam could lead effectively remained to be seen, but Republican leaders also recognized the constitutional limits of removing him from office. Speaker Cox conveyed this interpretation: "I think there's a rightful hesitation about removal from office, because obviously you have to consider that to some degree you're overturning an election. I think the constitutional provisions are very specific . . . it really does call for mental or physical incapacitation."<sup>95</sup> His only resort, particularly after Northam's performance at the Saturday news conference, was to repeat the plea and appeal to Northam's judgment: "It had become clear to us by then, regardless of the veracity of the photograph, the governor's lost the confidence of the people and cannot effectively govern."<sup>96</sup> Perhaps the Governor could not "govern," but the Assembly had work to do and Speaker Cox's most important role in this context was to recognize that reality and focus on the business of the Assembly.

*A. Justin Fairfax: Bipartisan on Resignation, Partisan and Chamber Splits on Investigation*

In responding to allegations against Fairfax, as with Northam, leaders evaluated the circumstances of the case (which changed over several days), the degree of party unity, and their institutional and party responsibilities. While members of both parties ultimately called on Fairfax to resign, their positions evolved as events unfolded and the leaders splintered across party and chamber lines over whether and how to investigate the case.<sup>97</sup> The

<sup>94</sup> Washington Post Staff, *supra* note 75.

<sup>95</sup> *Virginia Speaker Has 'Rightful Hesitation' About Impeaching Northam, Highlighting Potential Constitutional Impasse*, WTKR (Feb. 4, 2019), <https://wtkr.com/2019/02/04/virginia-speaker-has-rightful-hesitation-about-impeaching-northam-highlighting-potential-constitutional-impasse/>.

<sup>96</sup> Schneider et al., *supra* note 88.

<sup>97</sup> See Jacey Fortin, *Virginia is in Turmoil. Here's a Breakdown of 11 Days of Scandal*, N.Y. TIMES (Feb. 11, 2019), <https://www.nytimes.com/2019/02/08/us/politics/virginia-scandal.html>; see also Gregory S. Schneider & Laura Vozzella, *Va. Gov. Northam Weighs Resignation as Lt. Gov. Fairfax Faces Sex Assault Allegation*, WASH. POST (Feb. 4, 2019), <https://www.washingtonpost.com/local/virginia->

circumstances were different: while Northam awkwardly apologized for his actions, Fairfax vehemently denied the allegations made against him.<sup>98</sup> Moreover, in spite of Fairfax's plea for due process, leaders from both parties had to consider the publicly stated accusations and detailed accounts of assault from two alleged victims. Thus, unlike the overwhelming and immediate calls for Northam to resign, party organizations and leaders waited until accusers came forward publicly before calling on Fairfax to resign.<sup>99</sup> Moreover, unlike Northam, Fairfax faced a realistic prospect of impeachment, which exposed intra-party differences among Democrats, partisan splits between House Democratic and Republican leaders, and chamber differences between House and Senate leaders of the same party.<sup>100</sup>

The charges levied against Fairfax and his denial of those charges put the Democrats between a rock and some very hard places. Moreover, the racial and gender diversity of the House Democratic Caucus created a significant challenge for Democratic leaders, especially House Minority Leader Filler-Corn.<sup>101</sup> As noted above, the House Democratic Caucus included twenty-two women (forty-five percent of the caucus) and thirteen African Americans (twenty-seven percent of the caucus).<sup>102</sup> Members of the Legislative Black Caucus, who were offended by the racially tinged actions of the governor and attorney general, were now conflicted over the charges against Fairfax—a close ally, a rising star in the party, and an African American.<sup>103</sup> Should they adhere to the “Me Too Movement” and echo charges raised mostly by Democrats in the Brett Kavanaugh Supreme Court hearings?<sup>104</sup> Or, should they act with more circumspection in this case? Monique Alcala, Chair of the state Democratic Party's Latino Caucus, expressed that conflict:

---

politics/va-gov-northam-meets-with-cabinet-and-senior-staff-weighs-resignation/2019/02/04/3ec1f13c-2896-11e9-984d-9b8fba003e81\_story.html?noredirect=on&utm\_term=.da46146d5ee3.

<sup>98</sup> Jacey Fortin, *Virginia is in Turmoil. Here's a Breakdown of 11 Days of Scandal*, N.Y. TIMES (Feb. 11, 2019), <https://www.nytimes.com/2019/02/08/us/politics/virginia-scandal.html>.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> See generally Jenna Portnoy et al., *Democrats Grapple with Fairfax Assault Accusation in #MeToo Era*, WASH. POST (Feb. 5, 2019), [https://www.washingtonpost.com/local/virginia-politics/democrats-grapple-with-fairfax-assault-accusations-in-metoo-era/2019/02/05/4a4b096c-2972-11e9-b011-d8500644dc98\\_story.html?utm\\_term=.da8f9c367fd8](https://www.washingtonpost.com/local/virginia-politics/democrats-grapple-with-fairfax-assault-accusations-in-metoo-era/2019/02/05/4a4b096c-2972-11e9-b011-d8500644dc98_story.html?utm_term=.da8f9c367fd8) (describing Democratic lawmakers falling on different sides of how to handle accusations against Fairfax); Jonathan Martin & Michael Wines, *Unmistakable Divide Among Women in Virginia Over Accusations Against Fairfax*, N.Y. TIMES (Feb. 13, 2019), <https://www.nytimes.com/2019/02/13/us/politics/virginia-governor-scandal-democratic-women.html> (describing women as being divided over the issue because of race).

<sup>102</sup> Marans, *supra* note 32; see also *Our Members*, VA. HOUSE DEMOCRATS, <http://www.vahousedems.org/our-members/> (last visited Sept. 15, 2019) (listing all Democratic members of the Virginia House of Delegates).

<sup>103</sup> See Fortin, *supra* note 98.

<sup>104</sup> Jenna Portnoy et al., *Democrats Grapple with Fairfax Assault Accusation in #MeToo Era*, WASH. POST (Feb. 5, 2019), [https://www.washingtonpost.com/local/virginia-politics/democrats-grapple-with-fairfax-assault-accusations-in-metoo-era/2019/02/05/4a4b096c-2972-11e9-b011-d8500644dc98\\_story.html?utm\\_term=.da8f9c367fd8](https://www.washingtonpost.com/local/virginia-politics/democrats-grapple-with-fairfax-assault-accusations-in-metoo-era/2019/02/05/4a4b096c-2972-11e9-b011-d8500644dc98_story.html?utm_term=.da8f9c367fd8).

2019] WHERE YOU STAND DEPENDS ON WHERE THEY SIT

39

“I have so many different things going through my head right now. I’m a survivor of domestic violence and sexual assault; it’s hard to grapple with those two things. I’m a Democrat because we provide people with an opportunity for their stories to be told.”<sup>105</sup>

The answer to the question of how to handle Fairfax accusations evolved over several days. When the allegations first emerged, on Monday, February 4, most Democrats hesitated to make a judgment.<sup>106</sup> Senator L. Louise Lucas reflected the sentiments of many Democrats: “We don’t have all the information, but we take any allegation of sexual abuse or harassment very seriously and so we’re going to wait and see how the information evolves.”<sup>107</sup> Taking a pragmatic approach, Filler-Corn pointed out, “We have to stay focused. We’ve got 350-something bills to move.” Regarding the story about Fairfax, “Really, I haven’t had time to follow that right now, I’m just focused on the floor.”<sup>108</sup>

The situation changed somewhat when Vanessa Tyson, the first accuser, made a public announcement on Wednesday, February 6,<sup>109</sup> the same day that Herring announced he dressed to impersonate a black rapper.<sup>110</sup> In detail, Tyson described her encounter with Fairfax, and pointed out: “I cannot believe, given my obvious distress, that Mr. Fairfax thought this forced act was consensual.”<sup>111</sup> Tyson’s account was enough for first-term US House Representative, Jennifer Wexton: “I believe Vanessa Tyson.”<sup>112</sup> Yet Fairfax countered with a public statement of his own, acknowledging that women

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*; see also Gregory S. Schneider & Laura Vozzella, *Va. Gov. Northam Weighs Resignation as Lt. Gov. Fairfax Faces Sex Assault Allegation*, WASH. POST (Feb. 4, 2019), [https://www.washingtonpost.com/local/virginia-politics/va-gov-northam-meets-with-cabinet-and-senior-staff-weighs-resignation/2019/02/04/3ec1f13c-2896-11e9-984d-9b8fba003e81\\_story.html?noredirect=on&utm\\_term=.da46146d5ee3](https://www.washingtonpost.com/local/virginia-politics/va-gov-northam-meets-with-cabinet-and-senior-staff-weighs-resignation/2019/02/04/3ec1f13c-2896-11e9-984d-9b8fba003e81_story.html?noredirect=on&utm_term=.da46146d5ee3).

<sup>108</sup> Gregory S. Schneider & Laura Vozzella, *Va. Gov. Northam Weighs Resignation as Lt. Gov. Fairfax Faces Sex Assault Allegation*, WASH. POST (Feb. 4, 2019), [https://www.washingtonpost.com/local/virginia-politics/va-gov-northam-meets-with-cabinet-and-senior-staff-weighs-resignation/2019/02/04/3ec1f13c-2896-11e9-984d-9b8fba003e81\\_story.html?noredirect=on&utm\\_term=.da46146d5ee3](https://www.washingtonpost.com/local/virginia-politics/va-gov-northam-meets-with-cabinet-and-senior-staff-weighs-resignation/2019/02/04/3ec1f13c-2896-11e9-984d-9b8fba003e81_story.html?noredirect=on&utm_term=.da46146d5ee3).

<sup>109</sup> Fortin, *supra* note 98.

<sup>110</sup> *Id.*

<sup>111</sup> Samantha Schmidt et. al., *Professor Who Accused Virginia Lt. Gov. Justin Fairfax of 2004 Sexual Assault Issues Statement Detailing Alleged Incident*, WASH. POST (Feb. 6, 2019), [https://www.washingtonpost.com/local/virginia-politics/2019/02/06/daed33aa-2a30-11e9-b2fc-721718903bfc\\_story.html?utm\\_term=.a1802dc8aad7](https://www.washingtonpost.com/local/virginia-politics/2019/02/06/daed33aa-2a30-11e9-b2fc-721718903bfc_story.html?utm_term=.a1802dc8aad7).

<sup>112</sup> Diana S. Correll, *Democratic Congresswoman Turns on Justin Fairfax: ‘I Believe Vanessa Tyson.’*, WASH. EXAMINER (Feb. 6, 2019), <https://www.washingtonexaminer.com/news/virginia-democratic-law-maker-backs-justin-fairfax-accuser>.

should “come forward with allegations of sexual assault or harassment...” but “I cannot agree with a description of events that I know is not true.”<sup>113</sup>

For the moment—either because of the doubt Fairfax raised, or the possibility that, by calling for three executive officials’ to resign, Democrats implicitly consented to elevating a Republican Speaker to the Governor’s office—Democratic organizations and elected officials stopped short of calling for Fairfax’s resignation.<sup>114</sup> The House Democratic Caucus stated: “We continue to monitor with great concern the allegations Dr. Tyson has levied against our Lieutenant Governor. The sexual assault allegation is alarming, and we are treating it with the seriousness it deserves.”<sup>115</sup> The Legislative Black Caucus stated the allegations “should be thoroughly investigated.”<sup>116</sup>

But Democrats lost confidence in Fairfax on Friday, February 8, when a second accuser, Meredith Watson, alleged that he attacked her when they were undergraduates at Duke University.<sup>117</sup> Fairfax denied this allegation as well,<sup>118</sup> but that did not stop Democratic members of Congress and the General Assembly from demanding his resignation.<sup>119</sup> Senator Tim Kaine stated forcefully, “The allegations against him detail atrocious crimes, and he can no longer serve the Commonwealth.”<sup>120</sup> Other Democrats—such as Governor Terry McAuliffe and Democratic representatives Donald McEachin, Gerald Connolly, Don Beyer, Elaine Luria, Abigail Spanberger, and Wexton—issued similar demands for Fairfax’s resignation. Senator Mark Warner and Representative Bobby Scott believed Fairfax should resign if the allegations proved true.<sup>121</sup>

At the Assembly, the Legislative Black Caucus stated:

<sup>113</sup> *Lt. Gov. Justin Fairfax Releases Statement of Sexual Assault Allegation: ‘I Have Nothing to Hide.’*, WASH. POST (Feb. 6 2019), [https://www.richmond.com/news/virginia/government-politics/lt-gov-justin-fairfax-releases-statement-on-sexual-assault-allegation/article\\_f4040539-5c5c-5006-830f-f52748efa390.html](https://www.richmond.com/news/virginia/government-politics/lt-gov-justin-fairfax-releases-statement-on-sexual-assault-allegation/article_f4040539-5c5c-5006-830f-f52748efa390.html).

<sup>114</sup> See Paul Kane, *Democrats Struggle to Answer for Virginia Lieutenant Governor After Unified Stand Against Kavanaugh*, WASH. POST (Feb. 7 2019), [https://www.washingtonpost.com/powerpost/democrats-struggle-to-answer-for-virginia-lieutenant-governor-after-unified-stand-against-kavanaugh/2019/02/07/7dc94350-2af6-11e9-b2fc-721718903bfc\\_story.html?utm\\_term=.3ef89e53a5b1](https://www.washingtonpost.com/powerpost/democrats-struggle-to-answer-for-virginia-lieutenant-governor-after-unified-stand-against-kavanaugh/2019/02/07/7dc94350-2af6-11e9-b2fc-721718903bfc_story.html?utm_term=.3ef89e53a5b1).

<sup>115</sup> Maggie Severns & Anita Kumar, *Virginia Democrats Decline to Call on Fairfax, Herring to Resign*, POLITICO (Feb. 7, 2019), <https://www.politico.com/story/2019/02/07/virginia-justin-fairfax-1157842>.

<sup>116</sup> *Id.*

<sup>117</sup> Jenna Portnoy et al., *Second Woman Accuses Va. Lt. Gov. Justin Fairfax of Sexual Assault*, WASH. POST (Feb. 8, 2019), [https://www.washingtonpost.com/local/virginia-politics/second-woman-accuses-va-lt-gov-justin-fairfax-of-sexual-assault/2019/02/08/19e6bb6c-2bdf-11e9-b011-d8500644dc98\\_story.html?noredirect=on](https://www.washingtonpost.com/local/virginia-politics/second-woman-accuses-va-lt-gov-justin-fairfax-of-sexual-assault/2019/02/08/19e6bb6c-2bdf-11e9-b011-d8500644dc98_story.html?noredirect=on).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

2019] WHERE YOU STAND DEPENDS ON WHERE THEY SIT

41

In light of the most recent sexual assault allegations against Lieutenant Governor Justin Fairfax, the Virginia Legislative Black Caucus believe it is best for Lt. Governor Fairfax to step down from his position. We remain steadfast in our conviction that every allegation of sexual assault or misconduct be treated with the utmost seriousness.<sup>122</sup>

The Virginia Democrat Caucuses of the House and Senate issued a joint statement, “Due to the serious nature of these allegations, we believe Lt. Gov. Fairfax can no longer fulfill his duties to the Commonwealth. He needs to address this as a private citizen. The time has come for him to step down.”<sup>123</sup>

Democratic Delegate Patrick Hope was prepared to go a step further and begin impeachment proceedings.<sup>124</sup> Hope exclaimed, “There’s no question that violent sexual assault clearly qualifies as a high crime. I believe these women. He needs to resign immediately.”<sup>125</sup> If not, Hope and several Democrats prepared to bring to the House the following resolution:

Whereas the House of Delegates believes all allegations of sexual assault must be taken with the utmost seriousness; and whereas the House of Delegates believes the allegations made by Dr. Vanessa Tyson and Ms. Meredith Watson to be credible in nature, while also respecting the principles of due process; now, therefore, be it resolved by the House of Delegates that proceedings for the impeachment of Lieutenant Governor Justin E. Fairfax shall be initiated.<sup>126</sup>

However, Democrats differed over whether and how to move forward with an investigation that could lead to impeachment.<sup>127</sup> Fenit Nerappil of the *Washington Post* reported: “...legislators raised concerns, including whether the House could conduct an investigation, whether offenses predating public service in different

<sup>122</sup> Sophia Barnes et al., *Virginia Leaders Call on Lt. Gov. Fairfax to Resign; Delegate Says He'll Move to Impeach*, NBC4 (Feb. 10, 2019), <https://www.nbcwashington.com/blogs/first-read-dmv/Virginia-Leaders-Call-on-Fairfax-to-Resign-Threaten-Impeachment-505611511.html>.

<sup>123</sup> Alan Blinder & Campbell Robertson, *Virginia's Lieutenant Governor Faces Impeachment Threat and Calls to Resign*, N.Y. TIMES (Feb. 8, 2019), <https://www.nytimes.com/2019/02/08/us/politics/virginia-justin-fairfax.html?action=click&module=inline&pgtype=Homepage>.

<sup>124</sup> Barnes et al., *supra* note 122.

<sup>125</sup> *Id.*

<sup>126</sup> Fenit Nirappil, *Va. Democrat Backs Off Plans for Impeachment Proceedings Against Lt. Gov. Fairfax*, WASH. POST (Feb 11, 2019), [https://www.washingtonpost.com/local/virginia-politics/virginia-democrats-weigh-impeachment-of-lt-gov-justin-fairfax-over-sexual-assault-allegations/2019/02/10/b8933a48-2d64-11e9-8ad3-9a5b113ecd3c\\_story.html?utm\\_term=.6d0daa95b1fa](https://www.washingtonpost.com/local/virginia-politics/virginia-democrats-weigh-impeachment-of-lt-gov-justin-fairfax-over-sexual-assault-allegations/2019/02/10/b8933a48-2d64-11e9-8ad3-9a5b113ecd3c_story.html?utm_term=.6d0daa95b1fa).

<sup>127</sup> *Id.*

states are grounds for impeachment and whether it was unfair to target Fairfax for impeachment without doing so for Northam and Herring.”<sup>128</sup>

After discussions within the Democratic Caucus, Hope decided against introducing the resolution.<sup>129</sup> However, he still believed some form of investigation was warranted: “We owe it to all parties involved—especially the victims—to make sure that we have thought through every option the General Assembly has. That’s what these conversations are for—so we can build more consensus on a path forward.”<sup>130</sup> Thus, Filler-Corn was in a position to negotiate, within limits, with Republican leaders regarding the terms of a House investigation.<sup>131</sup> While many Democrats preferred a law enforcement investigation, Hope argued for an Assembly committee, noting that the accusers have “been very clear about asking the General Assembly to take a leadership role.”<sup>132</sup> However, at the same time, Senate Democratic Leader Saslaw voiced opposition to impeachment.<sup>133</sup> Noting that the allegations against Fairfax dealt with matters before he was elected, Saslaw objected: “Impeachment implies high crimes and misdemeanors while you are in office, that’s what it’s for.”<sup>134</sup> Thus, before an investigation began and regardless of what it might reveal, Saslaw was ruling out removal from office on constitutional grounds.<sup>135</sup>

After Tyson’s public accusation on, February 6, Speaker Cox called the allegations against Fairfax “extremely serious,” and alluded the need for an investigation: “The Lt. Governor, the alleged victim, and Virginians all deserve a full airing of the facts.”<sup>136</sup> Yet, after Watson’s allegation and after Democrats called for Fairfax’s resignation, Cox stated:

---

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> See Graham Moomaw, *House GOP Suggests Hearing on Fairfax Allegations During Session on Guns; Democrats Say They Won’t Participate in Political Games*, RICH. TIMES-DISPATCH (Jun. 18, 2019), [https://www.richmond.com/news/local/government-politics/house-gop-suggests-hearing-on-fairfax-allegations-during-session-on/article\\_57737544-c20a-554a-ba70-29c846733ca2.html](https://www.richmond.com/news/local/government-politics/house-gop-suggests-hearing-on-fairfax-allegations-during-session-on/article_57737544-c20a-554a-ba70-29c846733ca2.html).

<sup>132</sup> Graham Moomaw, *Va. House Democrats, GOP Speaker At Odds Over Who Should Lead in Investigating Fairfax Allegations*, RICH. TIMES-DISPATCH (Feb. 19, 2019), [https://www.richmond.com/news/virginia/government-politics/general-assembly/va-house-democrats-gop-speaker-at-odds-over-who-should/article\\_33134a15-f223-5d22-8743-cf387b937d27.html](https://www.richmond.com/news/virginia/government-politics/general-assembly/va-house-democrats-gop-speaker-at-odds-over-who-should/article_33134a15-f223-5d22-8743-cf387b937d27.html).

<sup>133</sup> Nirappil, *supra* note 126.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> Vernon Freeman, Jr., *House Speaker Kirk Cox Calls Attorney General Herring Blackface Admission ‘Shocking,’* WTVR (Feb 6, 2019), <https://wtvr.com/2019/02/06/house-speaker-cox-calls-attorney-general-herring-blackface-admission-shocking/>.

2019] WHERE YOU STAND DEPENDS ON WHERE THEY SIT

43

I deeply respect the principle of due process and believe that the gravity of this situation demands prudence and deliberation, but the Lt. Governor has clearly lost the trust and confidence of the people of Virginia. His ability to serve has been permanently impaired and, at this point, it is in the best interests of the Commonwealth for him to resign.<sup>137</sup>

Interestingly, Senate Leader Norment, who was dealing with criticisms of his role as editor of a Virginia Military Institute yearbook that contained racially offensive content,<sup>138</sup> did not publicly call for Fairfax to resign.<sup>139</sup>

Cox vowed to work with Filler-Corn on a bipartisan investigation.<sup>140</sup> The most critical issues were who would investigate and how the investigation would work. Cox wanted the case to be reviewed by a House committee with the objective of giving the alleged victims a voice and, depending on the outcome, with the possibility of impeachment from office.<sup>141</sup> Cox stated, “Vanessa Tyson, Meredith Watson deserve a voice,” and appealed to Democratic leaders, “We need to work on a process to do that. And I would like for you to come alongside us.”<sup>142</sup>

Yet, just as Saslaw balked on impeachment, Senate Republican Leader Norment stressed the Senate’s limited role in the impeachment process.<sup>143</sup> Until the House acted, the Senate had no role to play.<sup>144</sup> Moreover, since Fairfax was accused of an alleged crime that occurred prior to his election, other lawmakers argued that the Assembly had no role in this process.<sup>145</sup>

<sup>137</sup> Staff Reports, *House Speaker Cox Calls on Fairfax to Resign: Fairfax Asks for Full Investigation*, RICH. TIMES-DISPATCH (Feb. 9, 2019), [https://www.richmond.com/news/virginia/government-politics/general-assembly/house-speaker-cox-calls-on-fairfax-to-resign-fairfax-asks/article\\_9a210cda-dde6-5759-a904-902968723c76.html](https://www.richmond.com/news/virginia/government-politics/general-assembly/house-speaker-cox-calls-on-fairfax-to-resign-fairfax-asks/article_9a210cda-dde6-5759-a904-902968723c76.html).

<sup>138</sup> Andrew Cain & Justin Mattingly, *Norment on Racist Content in VMI Yearbook That He Worked On: ‘Use of Blackface is Abhorrent’*, RICH. TIMES-DISPATCH (Feb. 7, 2019), [https://www.richmond.com/news/virginia/government-politics/general-assembly/norment-on-racist-content-in-vmi-yearbook-that-he-worked-on/article\\_4a8d1d27-5f8b-55c5-859f-251ce9919562.html](https://www.richmond.com/news/virginia/government-politics/general-assembly/norment-on-racist-content-in-vmi-yearbook-that-he-worked-on/article_4a8d1d27-5f8b-55c5-859f-251ce9919562.html).

<sup>139</sup> See Patrick Wilson, *In Senate Speech, Va. Lt. Gov. Justin Fairfax Cautions Against ‘Political Lynchings’ and Says ‘The Truth is on My Side’*, RICH. TIMES-DISPATCH (Feb. 24, 2019), [https://www.richmond.com/news/virginia/government-politics/general-assembly/in-senate-speech-va-lt-gov-justin-fairfax-cautions-against/article\\_835389ba-bc69-5125-b0d2-8b2b8c596025.html](https://www.richmond.com/news/virginia/government-politics/general-assembly/in-senate-speech-va-lt-gov-justin-fairfax-cautions-against/article_835389ba-bc69-5125-b0d2-8b2b8c596025.html).

<sup>140</sup> See Laura Vozzella & Gregory S. Schneider, *Virginia House Speaker: Democrats Resisting Proposal for Panel to Investigate Fairfax*, WASH. POST (Feb. 21, 2019), [https://www.washingtonpost.com/local/virginia-politics/virginia-house-speaker-democrats-resisting-proposal-for-panel-to-investigate-fairfax/2019/02/21/2371abd8-3607-11e9-854a-7a14d7fec96a\\_story.html](https://www.washingtonpost.com/local/virginia-politics/virginia-house-speaker-democrats-resisting-proposal-for-panel-to-investigate-fairfax/2019/02/21/2371abd8-3607-11e9-854a-7a14d7fec96a_story.html).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> See Nirappil, *supra* note 126.

<sup>144</sup> See *id.*

<sup>145</sup> See *id.*



Republican Senator Emmett Hanger reflected this position, stating, “We put ourselves in peril if we ruin someone’s career and life for something that later turns out to be not founded.”<sup>146</sup> He continued, “They are only accusations now.”<sup>147</sup>

After attempts to reach a bipartisan agreement failed, Cox made direct appeals to Fairfax’s accusers to testify before a House Committee in the waning days of the Assembly session.<sup>148</sup> Once again, Senate Leader Norment demurred, “I’m not going to opine one way or the other because we would be sitting as a jury—if the Senate made the determination to participate.”<sup>149</sup> As it turned out, Watson agreed to come forward, but Tyson declined, leaving the House gridlocked over the question and leaving Fairfax in office.<sup>150</sup>

### B. Herring: Partisan Differences over Resignation

The case of Attorney General Mark Herring presented perhaps the greatest irony in the drama that unfolded during the first week of February. After Northam’s unconvincing news conference on Saturday, Herring joined the chorus of Democrats who called for Northam to resign, expressing confidence in Fairfax in the process.<sup>151</sup> “It is no longer possible for Governor Northam to lead our Commonwealth and it is time for him to step down,” Herring said.<sup>152</sup> “I have spoken with Lieutenant Governor Fairfax and assured him that, should he ascend to the governorship, he will have my complete

<sup>146</sup> Graham Moomaw, *With Impeachment Threat Against Fairfax, Virginia’s Political Crisis Enters Uncharted Territory*, RICH. TIMES-DISPATCH (Feb. 10, 2019), [https://www.richmond.com/news/virginia/government-politics/with-impeachment-threat-against-fairfax-virginia-s-political-crisis-enters/article\\_45392818-b902-5db9-bb38-aa5227ec596d.html](https://www.richmond.com/news/virginia/government-politics/with-impeachment-threat-against-fairfax-virginia-s-political-crisis-enters/article_45392818-b902-5db9-bb38-aa5227ec596d.html).

<sup>147</sup> *Id.*

<sup>148</sup> See Scott Calvert, *Virginia GOP Lawmakers to Ask Lt. Gov. Fairfax, Accusers to Testify*, WALL ST. J. (Feb. 22, 2019), <https://www.wsj.com/articles/virginia-gop-lawmakers-to-ask-lt-gov-fairfax-accusers-to-testify-11550865071>.

<sup>149</sup> Laura Vozzella & Gregory S. Schneider, *Va. Republicans Plan Public Hearings into Sex Assault Allegations Against Lt. Gov. Justin Fairfax*, WASH. POST (Feb. 22, 2019), [https://www.washingtonpost.com/local/virginia-politics/va-republicans-plan-hearings-into-sex-assault-allegations-against-lt-gov-justin-fairfax/2019/02/22/92eb5038-36b4-11e9-af5b-b51b7ff322e9\\_story.html?noredirect=on&utm\\_term=.ffa04d9d27fe](https://www.washingtonpost.com/local/virginia-politics/va-republicans-plan-hearings-into-sex-assault-allegations-against-lt-gov-justin-fairfax/2019/02/22/92eb5038-36b4-11e9-af5b-b51b7ff322e9_story.html?noredirect=on&utm_term=.ffa04d9d27fe).

<sup>150</sup> *Second Va. Lt. Gov. Justin Fairfax Accuser says She’s ‘Willing to Testify in Public’ in Op-Ed*, FOX5 (Feb. 18, 2019), <https://www.fox5dc.com/news/second-va-lt-gov-justin-fairfax-accuser-says-shes-willing-to-testify-in-public-in-op-ed>; Jonathan Martin, *Virginia House Invites Accusers to Testify Against Justin Fairfax*, N.Y. TIMES (Feb. 22, 2019), <https://www.nytimes.com/2019/02/22/us/politics/justin-fairfax-virginia.html>.

<sup>151</sup> Laura Vozzella & Gregory S. Schneider, *Gov. Northam Refuses to Step Down, Despite Flood of Calls for His Resignation Over Racist Photo*, WASH. POST (Feb. 2, 2019), [https://www.washingtonpost.com/local/virginia-politics/northam-mum-about-his-plans-after-a-flood-of-calls-for-his-resignation-for-racist-and-offensive-photo/2019/02/02/5883402a-26e9-11e9-90cd-dedb0c9dc17\\_story.html?utm\\_term=.6842a287e0bd](https://www.washingtonpost.com/local/virginia-politics/northam-mum-about-his-plans-after-a-flood-of-calls-for-his-resignation-for-racist-and-offensive-photo/2019/02/02/5883402a-26e9-11e9-90cd-dedb0c9dc17_story.html?utm_term=.6842a287e0bd).

<sup>152</sup> *Id.*

2019] WHERE YOU STAND DEPENDS ON WHERE THEY SIT

45

support and commitment to ensuring his success and the success of our Commonwealth.”<sup>153</sup>

Four days later, of course, Herring admitted to dressing in “brown face” at a college party and apologized for his behavior but did not agree to step down from his position.<sup>154</sup> Other than his artful and evidently persuasive mea culpa, it is hard to tell, on any principled grounds, why Herring thought Northam should have resigned, but he (Herring) should remain in office. Democrats seemed to accept Herring’s claim that his act was a result of “ignorance and glib attitudes” rather than racism, viewed his case as the least egregious of the three, and were willing to give him the benefit of the doubt.<sup>155</sup> Senator Kaine articulated this view: “[Herring] reached out to each of us individually, very apologetic, he is in dialogue with the legislative black caucus and African-American leadership in the state and they have been impressed with his sincerity while they’ve been very disappointed with what happened.”<sup>156</sup>

Still, it is reasonable to conclude that the troubles surrounding Fairfax buoyed Herring. Second in the line of succession after the Lieutenant Governor, if Northam was forced out and Fairfax was deemed unfit to serve, Herring was the only Democrat between the Governor’s office and the fourth in line—Republican Speaker Cox.<sup>157</sup> Democratic Congressman Donald Beyer expressed the pragmatic logic behind the party’s tepid response to Herring’s admission:

There are cynics who say this is about the next election. I think it’s more about values. We would move from a progressive, very strong attorney general to someone who’s not just a Republican but someone who’s on the arch-conservative end of it, so the way our laws would be administrated would be completely different.<sup>158</sup>

<sup>153</sup> *Id.*

<sup>154</sup> Jonathan Martin & Alan Blinder, *Second Virginia Democrat Says He Wore Blackface, Throwing Party Into Turmoil*, N.Y. TIMES (Feb. 6, 2019), <https://www.nytimes.com/2019/02/06/us/politics/virginia-blackface-mark-herring.html>.

<sup>155</sup> *See id.*; *see also* Alan Binder & Jonathan Martin, *Virginia Political Crisis Grows for Democrats and Republicans*, N.Y. TIMES (Feb 7, 2019), <https://www.nytimes.com/2019/02/07/us/virginia-governor-scandal.html>.

<sup>156</sup> Alan Binder & Jonathan Martin, *Virginia Political Crisis Grows for Democrats and Republicans*, N.Y. TIMES (Feb 7, 2019), <https://www.nytimes.com/2019/02/07/us/virginia-governor-scandal.html>.

<sup>157</sup> *See id.*

<sup>158</sup> Jim Geraghty, *Why Virginia Democrats Aren’t Quite So Mad at Mark Herring*, NAT’L REV. (Feb. 11, 2019), <https://www.nationalreview.com/corner/why-virginia-democrats-arent-quite-so-mad-at-mark-herring/>.

Given the choice between their own progressive attorney general and the possibility of Speaker Kirk Cox, a more conservative Republican, the answer, to most Democrats was quite obvious: stick with Herring, warts and all.<sup>159</sup> As Larry Sabato pointed out: “Speculation that all 3 statewide VA Dem officeholders will resign is overwrought. One or more will survive. VA Dems won in an anti-Trump landslide in 2017. They’re not going to turn government over to a pro-Trump GOP House Speaker.”<sup>160</sup>

Under these circumstances, Republicans parted company with the Democrats; the Virginia GOP called for Herring to resign, and Cox all but called for his resignation.<sup>161</sup> “The belated admission from Attorney General Herring is shocking. He should adhere to the standard he has set for others or he loses credibility.”<sup>162</sup> Interestingly, Senate Majority Leader Norment, who defended himself against a controversy over his role as editor of a VMI yearbook that contained racist photos, remained silent on the Herring case.<sup>163</sup> Of course, Herring declined to resign,<sup>164</sup> and similar with Northam’s case, Republican leaders had no alternative means to remove him from office.<sup>165</sup>

### III. “IT JUST WENT POOF”: NORMALCY PREVAILS OVER CHAOS

In describing the limited impact of the trifecta of scandals that many thought would bring Virginia government to a screeching halt, one Virginia resident noted, “It just went poof. It was like it never happened.”<sup>166</sup> While

<sup>159</sup> See Charles Bethea, *Northam and Fairfax Aren’t Leaving, and Virginia Democrats are Still Trying to Sort Things Out*, NEW YORKER (Feb. 11, 2019), <https://www.newyorker.com/news/news-desk/virginia-democrats-are-still-trying-to-sort-this-out>; Cain & Mattingly, *supra* note 138.

<sup>160</sup> John Bacon, ‘Tumultuous’: Virginia Politics in Chaos Amid Northam, Fairfax, and Herring Scandals, USA TODAY (Feb. 8, 2019), <https://www.usatoday.com/story/news/nation/2019/02/07/ralph-northam-justin-fairfax-mark-herring-virginia-politics-chaos/2799369002/>.

<sup>161</sup> Jeff Williamson, *Republicans Calling for AG Mark Herring to Resign After His Blackface Admission*, WLSL10 (Feb. 6, 2019), <https://www.wsls.com/news/virginia/republicans-calling-for-ag-mark-herring-to-resign-after-his-blackface-admission>; see Freeman, Jr., *supra* note 136.

<sup>162</sup> Wilson & Moomaw, *supra* note 74.

<sup>163</sup> See Cain & Mattingly, *supra* note 138; Matthew Choi, *Virginia Republican Edited Yearbook with Racist Images*, POLITICO (Feb. 7, 2019), <https://www.politico.com/story/2019/02/07/virginia-republican-racist-vmi-yearbook-1157490>.

<sup>164</sup> See Jenny Gathright, *Virginia AG Mark Herring Explains Why He Called for Ralph Northam to Resign*, WAMU 88.5 (Mar. 4, 2019), <https://wamu.org/story/19/03/04/virginia-ag-mark-herring-explains-why-he-called-for-ralph-northam-to-resign/>.

<sup>165</sup> See Eugene Robinson, *Northam, Fairfax and Herring Should All Resign in Virginia*, REAL CLEAR POL. (Feb. 12, 2019), [https://www.realclearpolitics.com/articles/2019/02/12/for\\_the\\_benefit\\_of\\_democrats\\_and\\_virginia\\_investigate\\_the\\_states\\_top\\_leaders\\_139435.html](https://www.realclearpolitics.com/articles/2019/02/12/for_the_benefit_of_democrats_and_virginia_investigate_the_states_top_leaders_139435.html); Eli Watkins, *Virginia Speaker Has ‘Rightful Hesitation’ About Impeaching Northam, Highlighting Potential Constitutional Impasse*, CNN (Feb. 4, 2019), <https://www.cnn.com/2019/02/04/politics/virginia-ralph-northam-impeachment/index.html>.

<sup>166</sup> Campbell Robertson, “It Just Went Poof”: The Strange Aftermath of Virginia’s Cascade of Political Scandals, N.Y. TIMES (Apr. 2, 2019), <https://www.nytimes.com/2019/04/02/us/virginia-scandal-northam-fairfax.html>.

reporters and bloggers mainly focused on the drama surrounding the state's top three Democratic officials, legislative leaders attended to legislative business. Leaders responded to rapidly changing events, but amidst the chaos surrounding the Executive, the General Assembly proved capable of conducting its business.<sup>167</sup> This article concludes by describing the evidence of a normal legislative process, policy outcomes, and political developments that were expected of the Assembly before the revelations of early February; assessing the impact of the crises on the influence of the Legislative Black Caucus; and offering explanations for why normalcy prevailed.

#### IV. THE LEGISLATIVE PROCESS AND PUBLIC POLICY

In his summary of the 2019 Assembly session, Speaker Cox noted: Committee meetings took place. Constituents were served. Legislation was heard, considered, and debated. Bills were passed. The budget was balanced. When the General Assembly adjourned last Sunday, it was clear the House and Senate brought stable leadership and delivered results on the issues that matter most at a time when the [C]ommonwealth needed it most.<sup>168</sup>

The same week that all three scandals were dominating the news in the Old Dominion, the General Assembly reached a bipartisan agreement on a bill to provide more than \$1 billion in tax relief to Virginians.<sup>169</sup> Democratic Leader Filler-Corn noted:

Mr. Speaker—and members of the body, the past few days have been incredibly difficult and painful for us personally and for the Commonwealth of Virginia. But, Mr. Speaker—our constituents sent us all here to do a job, a very specific job. As we begin to debate the budget, I have a message to all Virginians: House Democrats are here. We are

<sup>167</sup> See Kirk Cox, *The General Assembly Delivered on Issues That Matter Most to Virginians*, RICH. TIMES-DISPATCH (Mar. 2, 2019), [https://www.richmond.com/opinion/their-opinion/guest-column-ists/kirk-cox-column-the-general-assembly-delivered-on-issues-that/article\\_4bcc77d4-accd-5c3c-81d6-2ceaec1fcd08.html](https://www.richmond.com/opinion/their-opinion/guest-column-ists/kirk-cox-column-the-general-assembly-delivered-on-issues-that/article_4bcc77d4-accd-5c3c-81d6-2ceaec1fcd08.html).

<sup>168</sup> *Id.*

<sup>169</sup> See Gregory S. Schneider et al., *Richmond May Seem to be in Chaos, But Lawmakers Just Reached a Bipartisan Deal on Taxes*, WASH. POST (Feb. 8, 2019), [https://www.washingtonpost.com/local/virginia-politics/richmond-may-seem-to-be-in-chaos-but-virginia-lawmakers-just-reached-a-bipartisan-deal-on-taxes/2019/02/08/7c67346c-2bbf-11e9-b011-d8500644dc98\\_story.html?utm\\_term=.dbaed5e6cc25](https://www.washingtonpost.com/local/virginia-politics/richmond-may-seem-to-be-in-chaos-but-virginia-lawmakers-just-reached-a-bipartisan-deal-on-taxes/2019/02/08/7c67346c-2bbf-11e9-b011-d8500644dc98_story.html?utm_term=.dbaed5e6cc25).

here representing you and doing the work of legislating and of governing the Commonwealth of Virginia.<sup>170</sup>

Two weeks later, the legislature passed the state budget, including the tax relief, with just one dissenting vote in the House and none in the Senate.<sup>171</sup> House Appropriations chair Chris Jones expressed the feeling of the legislative body when he said, “We wanted to let Virginia and the rest of the country know, while they might see chaos around the Capitol at the 30,000-foot level, we were focused on the job at hand.”<sup>172</sup>

That job included passing more than the budget. Of the 2,000 bills (1,204 House and 796 Senate) introduced in 2019 Session of the Virginia General Assembly, 883 of them passed both chambers for a passage rate of just over forty-four percent.<sup>173</sup> As the below table indicates, the 2019 Session’s productivity was similar to the three most recent short (odd year) sessions and slightly ahead of the 2015 session—the comparable point in the previous governor’s term.<sup>174</sup> Delegate Jeff Bourne may have summed up the scandals’ negligible impact on the Assembly’s productivity: “I think it’s one of those things where we are operating in the current state of affairs. And the current state of affairs is that the governor and lieutenant governor are still there.”<sup>175</sup>

#### V. LEGISLATIVE PRODUCTIVITY, VIRGINIA GENERAL ASSEMBLY: 2013-2019<sup>176</sup>

<sup>170</sup> Press Release, Va. House Democrats, Leader Eileen Filler-Corn’s Remarks on the Floor of the House of Delegates (Feb. 7, 2019), <http://www.vahousedems.org/2019/02/07/leader-eileen-filler-corns-remarks-on-the-floor-of-the-house-of-delegates/>.

<sup>171</sup> See Michael Martz, *Virginia Legislature Passed Budget and Closes Scandal-Marred Session*, RICH. TIMES-DISPATCH (Feb. 24, 2019), [https://www.richmond.com/news/virginia/government-politics/general-assembly/virginia-legislature-passes-budget-and-closes-scandal-marred-session-a/article\\_d8996e3f-0f86-5231-b43f-35c667676c5f.html](https://www.richmond.com/news/virginia/government-politics/general-assembly/virginia-legislature-passes-budget-and-closes-scandal-marred-session-a/article_d8996e3f-0f86-5231-b43f-35c667676c5f.html).

<sup>172</sup> *Id.*

<sup>173</sup> See *2019 Session: Session Statistics*, VA. LEGIS. INFO. SYS., <https://lis.virginia.gov/lis.htm> (last visited Sept. 13, 2019).

<sup>174</sup> Compare *id.*, with *2017 Session: Session Statistics*, VA. LEGIS. INFO. SYS., <https://lis.virginia.gov/cgi-bin/legp604.exe?171+oth+STA> (last visited Sept. 13, 2019), and *2015 Session: Session Statistics*, VA. LEGIS. INFO. SYS., <https://lis.virginia.gov/cgi-bin/legp604.exe?171+oth+STA> (last visited Sept. 13, 2019), and *2013 Session: Session Statistics*, VA. LEGIS. INFO. SYS., <https://lis.virginia.gov/cgi-bin/legp604.exe?171+oth+STA> (last visited Sept. 13, 2019).

<sup>175</sup> Robertson, *supra* note 166.

<sup>176</sup> *2019 Session: Session Statistics*, *supra* note 173; *2017 Session: Session Statistics*, VA. LEGIS. INFO. SYS., <https://lis.virginia.gov/cgi-bin/legp604.exe?171+oth+STA> (last visited Sept. 13, 2019); *2015 Session: Session Statistics*, VA. LEGIS. INFO. SYS., <https://lis.virginia.gov/cgi-bin/legp604.exe?171+oth+STA> (last visited Sept. 13, 2019); *2013 Session: Session Statistics*, VA. LEGIS. INFO. SYS., <https://lis.virginia.gov/cgi-bin/legp604.exe?171+oth+STA> (last visited Sept. 13, 2019).

2019]

WHERE YOU STAND DEPENDS ON WHERE THEY SIT

49

	Bills Introduced			Bills Passed			% Passed
	House	Senate	Total	House	Senate	Total	
2019	1,204	796	2,000	522	361	883	44.1%
2017	1,086	813	1,899	515	365	880	46.3%
2015	1,126	793	1,919	456	344	806	42.0%
2013	1,047	692	1,739	489	323	814	46.8%

## VI. INFLUENCE OF THE LEGISLATIVE BLACK CAUCUS

While the scandals do not appear to have had a significant impact on the 2019 Session's productivity and activity, they may have raised the prominence and increased the influence of the Virginia Legislative Black Caucus (VLBC). That influence showed up a few days after Republicans reached a bipartisan agreement with Democratic leaders and Governor Northam over a tax conformity bill.<sup>177</sup> The critical point in negotiations came during the week of February 4, when Northam was much less visible.<sup>178</sup> Aubrey Lane, Jr., the Secretary of Finance, served as the point of contact between the Governor and Assembly tax writers.<sup>179</sup> With the time pressure mounting to pass legislation before most Virginians filed their taxes, the two parties raised the standard deduction, agreeing to a Senate bill's main outlines that provided broad tax relief.<sup>180</sup>

Though most Democrats concurred with the compromise, several African American legislators opposed it because the bill's revenues were not fairly distributed to low-income earners.<sup>181</sup> Since the bill qualified as emergency legislation, it needed approval from four-fifths of the House and Senate.<sup>182</sup> Initially, the House fell six votes short of the eighty needed for final passage, as twenty-three Democrats voted against the compromise.<sup>183</sup> Delegate Jennifer Carroll Foy stated, "The tax deal is a bad deal for working

<sup>177</sup> See Michael Martz, *Virginia Legislators Adopt Tax Package on Fast Route, After Racial Equity Reshapes Debate*, RICH. TIMES-DISPATCH (Feb. 11, 2019), [https://www.richmond.com/news/virginia/government-politics/general-assembly/virginia-legislators-adopt-tax-package-on-fast-route-after-racial/article\\_f32b009c-320d-561d-9de7-40a0f766de0c.html](https://www.richmond.com/news/virginia/government-politics/general-assembly/virginia-legislators-adopt-tax-package-on-fast-route-after-racial/article_f32b009c-320d-561d-9de7-40a0f766de0c.html) ("[T]he debate was transformed by the black caucus.").

<sup>178</sup> *Id.*

<sup>179</sup> See Jordan Pascale, *Transportation Secretary Aubrey Layne Will be Finance Secretary in Northam Administration*, VIRGINIAN-PILOT (Nov. 16, 2017), [https://www.pilotonline.com/government/virginia/article\\_9f594242-baee-5ade-a31d-56bc2d78e57b.html](https://www.pilotonline.com/government/virginia/article_9f594242-baee-5ade-a31d-56bc2d78e57b.html).

<sup>180</sup> Act of Feb. 15, 2019, ch. 17, 2019 Va. Acts (codified as amended at VA. CODE §§ 58.1-301, 58.1-322.03, 58.1-402); see also Max Smith, *Deal Reached For Virginia Tax Plan*, WTOP (Feb. 8, 2019), <https://wtop.com/virginia/2019/02/deal-reached-for-virginia-tax-plan/>.

<sup>181</sup> Martz, *supra* note 177.

<sup>182</sup> VA. CONST. art. IV, § 11; *id.*

<sup>183</sup> Martz, *supra* note 177.

families, especially African-American and Latino families.”<sup>184</sup> Delegate Jeff Bourne said the agreement was “extremely damaging to children of color and school divisions with high concentrations of children living in poverty.”<sup>185</sup> Black Caucus Democrat Joe Lindsey also voted against the bill and asked for a recess to negotiate a more suitable compromise that would provide tax relief sooner, and would include promises to fund programs through the budget to be passed later in the Session.<sup>186</sup> After Appropriations Chair Jones promised to fund education and eviction diversion programs in the budget, the House returned from recess and the bill passed 95-4.<sup>187</sup>

Northam’s promise to dedicate the rest of his tenure to racial reconciliation meant the VLBC had the Governor’s undivided attention.<sup>188</sup> Despite—and perhaps because of—the fact that the VLBC was one of the first groups to demand his resignation, Northam committed himself to addressing racial inequities.<sup>189</sup> He promised to make the agenda of the VLBC—particularly education spending, affordable housing and criminal justice reform—his agenda.<sup>190</sup> Delegate Lamont Bagby, chair of the VLBC, signaled approval of the bills Northam vetoed and amendments he offered during the veto session.<sup>191</sup> Northam also signed into law a bill that the Caucus supported to create the 21-member African American Advisory Board that “will advise governors on issues important to African Americans and submit annual reports to lawmakers. The board can also undertake studies and conduct research to present to the governor as well accept and spend grant money.”<sup>192</sup>

## VII. POLITICAL IMPLICATIONS

Since the majority party is mostly responsible for the process and outcomes of the General Assembly, Republicans realized that building a record of legislative accomplishment was the best way to position the party for

---

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> See *Virginia Legislative Black Caucus Signaling a Willingness to Work With Gov. Northam*, WINA, <https://wina.com/news/064460-virginia-legislative-black-caucus-signaling-a-willingness-to-work-with-gov-northam/> (last visited Sept. 28, 2019).

<sup>189</sup> See *id.*

<sup>190</sup> See Robertson, *supra* note 166.

<sup>191</sup> *Id.*

<sup>192</sup> Associated Press, *Northam OKs Bill Creating African-American Advisory Board*, WTOP (Mar. 25, 2019), <https://wtop.com/virginia/2019/03/northam-oks-bill-creating-african-american-advisory-board/>; see Mel Leonor, *Northam Signs Bill to Create Advisory Board on African-American Issues*, RICH. TIMES-DISPATCH (Mar. 22, 2019), [https://www.richmond.com/news/virginia/government-politics/general-assembly/northam-signs-bill-to-create-advisory-board-on-african-american/article\\_dd88da41-3bd5-5c0d-9697-cb9984d53c44.html](https://www.richmond.com/news/virginia/government-politics/general-assembly/northam-signs-bill-to-create-advisory-board-on-african-american/article_dd88da41-3bd5-5c0d-9697-cb9984d53c44.html).

2019] WHERE YOU STAND DEPENDS ON WHERE THEY SIT

51

the impending elections.<sup>193</sup> Two days after the session ended, Speaker Cox took credit for the achievements of the session.<sup>194</sup> “The 2019 General Assembly session served as a stark reminder of an important lesson: Leadership matters. The controversies surrounding the executive branch brought chaos and embarrassment, while the steady leadership of the Republican-led General Assembly delivered meaningful results.”<sup>195</sup> At the end of his editorial Cox made a direct reference to the electoral consequences of the session:

Voters going to the polls this fall will have a strong point of reference by which to judge their choices. Leadership matters. As long as Republicans continue to lead the General Assembly, the people of the commonwealth can count on steady hands to deliver on the issues they care about most.<sup>196</sup>

In fact, the 2019 campaign began almost immediately after the session ended.<sup>197</sup> Gregory S. Schneider and Laura Vozzella of the *Washington Post* reported, “Just 15 minutes after gaveling out, House Republicans launched a YouTube ad that spliced national coverage of the Democratic scandals with local TV reports on Republican plans for school safety, tax cuts, and autism. ‘Virginia’s choice is clear: chaos and embarrassment,’ a female narrator says, ‘or leadership and results.’”<sup>198</sup> A day later, Cox posted the campaign style video, “Leadership Matters,” on twitter (@Kirk Cox).<sup>199</sup>

On the Democratic side of the aisle, despite the distractions coming at them every day, Leaders Saslaw and Filler-Corn encouraged their members to keep their eyes focused on their jobs—to represent their constituents, pass or defeat laws, and position the party to take the majority in the 2019 elections.<sup>200</sup> Accordingly, the Democratic party and its leaders continued to engage in the activities that Matthew Green ascribed to minority parties in

<sup>193</sup> See Cox, *supra* note 167 (discussing the many accomplishments of the 2019 General Assembly session).

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> See Schneider & Vozzella, *supra* note 10.

<sup>198</sup> *Id.*

<sup>199</sup> Kirk Cox (@SpeakerCox), TWITTER (Feb. 25, 2019, 1:57 PM), <https://twitter.com/SpeakerCox/status/1100152737038245888>; see *House Speaker Kirk Cox Tweets Stab at Virginia Democrats*, WVEC-ABC NEWS (Feb. 25, 2019), <https://www.13newsnow.com/article/news/politics/house-speaker-kirk-cox-tweets-stab-at-virginia-democrats/291-88b98331-e7b7-4438-b5cd-8203d0e3652b>.

<sup>200</sup> See Marie Albiges, *Fellow Democrats Called for Northam to Resign. Now Many are Taking His Money*, DAILY PRESS (June 17, 2019), <https://www.dailypress.com/virginia/dp-nws-northam-campaign-donations-20190614-story.html>; see also Max Smith, *Northam Makes First N. Va. Appearance Since Blackface Scandal Broke*, WTOP (Mar. 26, 2019), <https://wtop.com/virginia/2019/03/governor-makes-first-nova-appearance-since-blackface-scandal-broke/>.



his study of Congressional minority parties: electioneering, messaging, obstruction, and legislating.<sup>201</sup>

In terms of electioneering, the party continued to raise money to prepare for the 2019 elections.<sup>202</sup> In the first quarter of 2019, as the scandals were all over the news and the web, Democratic legislative candidates outraised their Republican counterparts by \$800,000 in the Senate and \$700,000 in the House.<sup>203</sup> They were also able to field strong candidates.<sup>204</sup> In June, Democrats announced the largest coordinated party campaign in its history: “Take the Majority 2019.”<sup>205</sup> According to Senate Democratic Caucus Chair Locke, Democrats will field candidates in thirty-five of the forty Senate districts, a record high.<sup>206</sup> Despite all of the distractions, the Democrats and their leaders kept their eyes fixed squarely on the prize of taking the majority in 2019.<sup>207</sup>

Democratic leaders also paid attention to messaging. According to Delegate Filler-Corn, the most difficult part of her job as Majority Leader in the Spring of 2019 was perhaps trying to keep the members of her caucus on message and encouraging them not to respond to every journalist or blogger who jabbed a microphone or cell phone in front of them. “We needed to stay focused and stay on message about issues and not be distracted by everything going on. This was particularly difficult for some of the newer members who felt it necessary to respond to every new piece of information or accusation.”<sup>208</sup> Even when responding to the crises, Democrats tried to move the message from the scandals to fairness and process,<sup>209</sup> a much safer political

<sup>201</sup> MATTHEW N. GREEN, UNDERDOG POLITICS: THE MINORITY PARTY IN THE US HOUSE OF REPRESENTATIVES 20 (2015)

<sup>202</sup> See Laura Vozzella, *Virginia Democrats Raise Twice As Much As Republicans Ahead of Critical Elections*, WASH. POST (July 17, 2019), [https://www.washingtonpost.com/local/virginia-politics/virginia-democrats-raise-twice-as-much-as-republicans-ahead-of-critical-elections/2019/07/16/2a479bbc-a7da-11e9-86dd-d7f0e60391e9\\_story.html](https://www.washingtonpost.com/local/virginia-politics/virginia-democrats-raise-twice-as-much-as-republicans-ahead-of-critical-elections/2019/07/16/2a479bbc-a7da-11e9-86dd-d7f0e60391e9_story.html).

<sup>203</sup> Laura Vozzella, *Fundraising Dries Up for Virginia's Three Tainted Leaders, but Not For Their Fellow Democrats*, WASH. POST (Apr. 16, 2019), [https://www.washingtonpost.com/local/virginia-politics/fundraising-dries-up-for-vas-three-tainted-leaders-but-not-for-their-fellow-democrats/2019/04/16/a50ef0b8-605c-11e9-9412-daf3d2e67c6d\\_story.html?utm\\_term=.a0ce0de53437](https://www.washingtonpost.com/local/virginia-politics/fundraising-dries-up-for-vas-three-tainted-leaders-but-not-for-their-fellow-democrats/2019/04/16/a50ef0b8-605c-11e9-9412-daf3d2e67c6d_story.html?utm_term=.a0ce0de53437).

<sup>204</sup> Democratic Party of Va., *Virginia Democrats Announce “Take the Majority, 2019” Coordinated Campaign*, VADEMS (July 19, 2019), <https://vademocrats.org/news/virginia-democrats-announce-take-the-majority-2019-coordinated-campaign/> (describing the diverse field of 2019 Democratic candidates: “they are veterans, they are educators, they are mothers and fathers, they are community leaders.”).

<sup>205</sup> *Id.*

<sup>206</sup> *Senate Democrats Announce Nominees in Record-Breaking Thirty-Five Senate Districts*, VA. SENATE DEMOCRATIC CAUCUS (June 11, 2019), <http://www.vasenatedems.com/news/senate-democrats-announce-nominees-in-a-record-breaking-thirty-five-contested-districts/>.

<sup>207</sup> See Democratic Party of Va., *supra* note 204.

<sup>208</sup> Telephone Interview with Eileen Filler-Corn, House Minority Leader, Va. House of Delegates (July 17, 2019).

<sup>209</sup> See Max Smith, *Big Changes for Virginians Possible in ‘Veto Session’ Still Shadowed by Scandal*, WTOP (Apr. 3, 2019), <https://wtop.com/virginia/2019/04/road-safety-and-construction-on-agenda-for-veto-session-still-shadowed-by-scandal/>.

message for them. In rejecting Republican demands for a legislative hearing on the Fairfax allegations, Filler-Corn responded, “We will not participate in House Republicans’ political games, nor will we turn such serious allegations into a partisan sideshow.”<sup>210</sup> A review of press releases from the House and Senate Democratic Caucuses during February and March reveal this concerted effort to stay on message with discussions of health care,<sup>211</sup> taxes,<sup>212</sup> the environment,<sup>213</sup> the Equal Rights Amendment,<sup>214</sup> child welfare,<sup>215</sup> the state budget,<sup>216</sup> and the 2019 elections,<sup>217</sup> but not a single word about the scandals.

Finally, while the majority party is most responsible for legislating, members of the minority party also try to influence legislative outcomes. During the 2019 session of the Virginia Assembly, Senate Democrats were the Chief Patron of 364 bills<sup>218</sup> (an average of more than 18 bills per Democratic Senator) and House Democrats were the Chief Patron of 612 bills (an average of 12.75 bills per Democratic member).<sup>219</sup> Indeed, the average House Democrat introduced nearly one more bill (12.75) during the 2019 session than the average Republican member (11.84).<sup>220</sup> Further, despite their minority status, Democrats were able to count several significant policy victories during the 2019 legislative session, including legislation related to affordable

<sup>210</sup> Laura Vozzella, *Va. Republicans Call for Hearings on Lt. Gov. Fairfax During July 9 Gun Session*, WASH. POST (June 18, 2019), [https://beta.washingtonpost.com/local/virginia-politics/va-republicans-call-for-hearings-on-lt-gov-fairfax-during-july-9-gun-session/2019/06/18/0d29b438-91e7-11e9-b58a-a6a9afaa0e3e\\_story.html](https://beta.washingtonpost.com/local/virginia-politics/va-republicans-call-for-hearings-on-lt-gov-fairfax-during-july-9-gun-session/2019/06/18/0d29b438-91e7-11e9-b58a-a6a9afaa0e3e_story.html).

<sup>211</sup> *Senate Republicans Stand with Trump Administration to Strip Healthcare from Hundreds of Thousands in the Commonwealth*, VA. SENATE DEMOCRATIC CAUCUS (Mar. 27, 2019), <http://www.vasenatedems.com/news/senate-republicans-stand-with-trump-administration-to-strip-healthcare-from-hundreds-of-thousands-in-the-commonwealth>

<sup>212</sup> *Senate Democratic Caucus Chair Responds to the Passage of Senate Republicans’ Short-Sighted Tax Proposal*, VA. SENATE DEMOCRATIC CAUCUS (Feb. 1, 2019), <http://www.vasenatedems.com/news/senate-democratic-caucus-chair-responds-to-the-passage-of-senate-republicans-short-sighted-tax-proposal>.

<sup>213</sup> *Senate Democrats Condemn the Passage of Anti-Climate Change Bill*, VA. SENATE DEMOCRATIC CAUCUS (Feb. 13, 2019), <http://www.vasenatedems.com/news/senate-democrats-condemn-the-passage-of-anti-climate-change-bill>

<sup>214</sup> *House Republicans Kill Equal Rights Amendment*, VA. HOUSE DEMOCRATS (Feb. 21, 2019), <http://www.vahousedems.org/2019/02/21/house-republicans-kill-equal-rights-amendment>.

<sup>215</sup> *Senator Monty Mason Sponsors Overhaul of Virginia’s Child Welfare System*, VA. SENATE DEMOCRATIC CAUCUS (Feb. 20, 2019), <http://www.vasenatedems.com/news/senator-monty-mason-sponsors-overhaul-of-virginias-child-welfare-system>.

<sup>216</sup> *Senate Democrats Applaud Bipartisan Budget*, VA. SENATE DEMOCRATIC CAUCUS (Feb. 24, 2019), <http://www.vasenatedems.com/news/senate-democrats-applaud-bipartisan-budget>.

<sup>217</sup> *Senate Democrats Recap Progress, Look Toward 2019 Elections*, VA. SENATE DEMOCRATIC CAUCUS (Mar. 19, 2019), <http://www.vasenatedems.com/news/senate-democrats-recap-progress-look-toward-2019-elections>.

<sup>218</sup> *Bill List: Signed by Speaker and President*, VA. LEGIS. INFO. SYS., <https://lis.virginia.gov/cgi-bin/legp604.exe?191+lst+SGN> (last visited Sept. 22, 2019).

<sup>219</sup> *Id.*

<sup>220</sup> The number of bills per member was calculated using data from the Virginia Legislative Information System. *See id.*

housing, voting rights, fair wages and child welfare.<sup>221</sup>

#### CONCLUSION: WHY THE SCANDALS WENT POOF?

So why did the scandals that initially appeared to be career-ending seem to just go “poof?” There are several possible explanations. First, some argue that in the era of President Trump when scandals and accusations seem to break daily, the public’s attention is distracted, and the impact of scandal is diminished.<sup>222</sup> The multiple accusations and admitted discretions associated with President Trump seem to have lowered the bar considerably for acceptable behavior.<sup>223</sup> According to one consultant, “Don’t apologize, move on, and everybody will talk about something else next week.”<sup>224</sup> Public opinion data, where initial polling found support for Northam and Fairfax resignations (Virginians seemed to give Herring the benefit of a doubt from the beginning), seems to support this explanation; but polls taken less than a month after the stories broke found dwindling support for resignations.<sup>225</sup>

Similarly, it is noteworthy that as time passed, although Fairfax has not been absolved from the allegations he faces,<sup>226</sup> Northam recovered considerable ground politically.<sup>227</sup> Herring, who escaped with the least amount of damage, is setting his sights on the future. Although Northam continued to face pockets of criticism,<sup>228</sup> he has come a long way from seeking shelter from protestors. In April, Senator Mark Warner retracted his call for Northam

<sup>221</sup> See *House Democrats Address Affordable Housing Crisis with Legislative Success*, VA. HOUSE DEMOCRATS (Feb. 13, 2019), <http://www.vahousedems.org/2019/02/13/house-democrats-address-affordable-housing-crisis-with-legislative-successes/> (discussing housing legislation passed this session); *Senate Democrats Recap Progress, Look Toward 2019 Elections*, *supra* note 217 (listing voting rights, fair wages, child welfare).

<sup>222</sup> See Alex Schroeder, *2 Years Since Trump’s Inauguration, Surveying an Extraordinary (And Desensitizing) Presidency*, WBUR ON POINT (Jan. 14, 2019), <https://www.wbur.org/onpoint/2019/01/14/trump-presidency-unthinkable-the-atlantic>.

<sup>223</sup> See *id.*

<sup>224</sup> Robertson, *supra* note 166.

<sup>225</sup> Compare Amanda Sakuma, *Polls Show Virginians Are Divided on Ralph Northam. The Jury’s Still Out on Justin Fairfax.*, VOX (Feb. 10, 2019), <https://www.vox.com/2019/2/10/18219220/virginia-northam-fairfax-polls-resignation> (“47% of Virginians want to see him stay”), with Catherine Kim, *Poll: Virginia Voters Want Their Governor to Stay Despite Blackface Controversy*, VOX (Apr. 10, 2019), <https://www.vox.com/2019/4/10/18304484/ralph-northam-virginia-blackface-controversy-poll> (“52% of voters...said the governor should stay in office”).

<sup>226</sup> See Brakkton Booker, *Despite Multiple Scandals, Top Virginia Officials Aren’t Going Anywhere Soon*, NPR (Apr. 4, 2019), <https://www.npr.org/2019/04/04/709637455/despite-multiple-scandals-top-virginia-leaders-arent-going-anywhere-soon>.

<sup>227</sup> See Gregory S. Schneider, *Virginia Republicans Thought Calling Ralph Northam ‘Gov. Blackface’ Would Help Them. That’s Changed.*, WASH. POST (Sept. 6, 2019), [https://beta.washingtonpost.com/local/virginia-politics/virginia-republicans-thought-labeling-democrat-ralph-northam-gov-blackface-would-help-them-now-they-think-otherwise/2019/09/06/85045cbe-d02c-11e9-b29b-a528dc82154a\\_story.html?noredirect=on](https://beta.washingtonpost.com/local/virginia-politics/virginia-republicans-thought-labeling-democrat-ralph-northam-gov-blackface-would-help-them-now-they-think-otherwise/2019/09/06/85045cbe-d02c-11e9-b29b-a528dc82154a_story.html?noredirect=on).

<sup>228</sup> See, e.g., Reginald Stuart, *Many Virginians Still Want Atonement for Racist Photo, Actions*, RICH. FREE PRESS (May 24, 2019), <http://richmondfreepress.com/news/2019/may/24/many-virginians-still-want-atonement-racist-photo/>.

to resign;<sup>229</sup> a poll in June revealed that his approval rating held steady from December, prior to the scandal;<sup>230</sup> delegates who called for his resignation accepted campaign contributions;<sup>231</sup> and if the Democrats win majorities in both chambers in 2019, Northam will be in a rare position to serve as Governor for two years under unified party control.<sup>232</sup>

A second explanation pertains to pragmatic and practical politics—a priority for legislative leaders of both parties. As noted above, for Republicans, building a legislative record to run in 2019 was better than risking the backlash of a failed impeachment effort.<sup>233</sup> Moreover, it seems likely that having three tainted Democrats in office going into the 2019 elections made more sense to Republicans than forcing them out of office.<sup>234</sup> Meanwhile, the Democrats needed this scandal to have a limited impact, and the narrative needed to be shifted in order for them to gain the coveted legislative majority in the fall of 2019.<sup>235</sup> Their electoral success depended on Northam's policy success; and, according to former Governor Terry McAuliffe's Chief of Staff, Paul Reagan, "The fact they have come through that period successfully, the wheels of government haven't come off, everything is functioning well, really bodes well for the governor's political position and his ability to emerge from this."<sup>236</sup> From the campaign trail, Senator Saslaw observed, "With all the doors I knocked on during the Democratic primary, only four mentioned the governor and they all said, 'back off.' The Governor's numbers are sky-high in my district!"<sup>237</sup>

<sup>229</sup> Patrick Wilson, *Sen. Warner Backs Off Call for Northam to Resign*, RICH. TIMES-DISPATCH (Apr. 1, 2019), [https://www.richmond.com/news/virginia/government-politics/sen-warner-backs-off-call-for-northam-to-resign/article\\_186853a5-617a-5d23-8061-9fb3317ac282.html#tncms-source=infinity-scroll-summary-siderail-latest](https://www.richmond.com/news/virginia/government-politics/sen-warner-backs-off-call-for-northam-to-resign/article_186853a5-617a-5d23-8061-9fb3317ac282.html#tncms-source=infinity-scroll-summary-siderail-latest).

<sup>230</sup> David Seidel, *Poll Finds Steady Support for Northam, Drop for a Democrat-Controlled General Assembly*, WVTf (June 26, 2019), <https://www.wvtf.org/post/poll-finds-steady-support-northam-drop-democrat-controlled-general-assembly#stream/0>.

<sup>231</sup> See Marie Albiges, *Fellow Democrats Called for Northam to Resign. Now Many are Taking His Money*, DAILY PRESS (June 17, 2019), <https://www.dailypress.com/virginia/dp-nws-northam-campaign-donations-20190614-story.html>.

<sup>232</sup> Gregory S. Schneider, *'A Rare Position': Va. Gov. Ralph Northam Could Wind Up With Great Power, Months After Almost Resigning*, WASH. POST (June 10, 2019), [https://www.washingtonpost.com/local/virginia-politics/a-rare-position-va-gov-ralph-northam-could-wind-up-with-great-power-months-after-almost-resigning/2019/06/10/c2bc49d2-8873-11e9-98c1-e945ae5db8fb\\_story.html](https://www.washingtonpost.com/local/virginia-politics/a-rare-position-va-gov-ralph-northam-could-wind-up-with-great-power-months-after-almost-resigning/2019/06/10/c2bc49d2-8873-11e9-98c1-e945ae5db8fb_story.html).

<sup>233</sup> See Schneider et al., *supra* note 88. See generally Susan Page, *Impeach Trump? Lessons Learned from Clinton's Impeachment, 20 Years Later*, USA TODAY (Dec. 18, 2019), <https://www.usatoday.com/story/news/politics/2018/12/18/20-years-after-clinton-impeachment-lessons-loom-trump-congress-russia/2287529002/> (describing the political impact of impeachment).

<sup>234</sup> See Cox, *supra* note 167.

<sup>235</sup> See Alan Greenblatt, *Virginia Scandals Threaten Democrats' High Election Hopes*, GOVERNING (Feb. 6, 2019), <https://www.governing.com/topics/politics/gov-virginia-governor-northam-fairfax-herring-blackface-assault.html>.

<sup>236</sup> Jon Kamp & Scott Calvert, *A Month After Scandal, How Virginia's Northam Governs*, WALL ST. J. (Mar. 1, 2019), <https://www.wsj.com/articles/in-month-since-scandal-virginia-governor-keeps-lower-profile-11551448801?ns=prod/accounts-wsj>.

<sup>237</sup> Interview with Richard Saslaw, Senator, Va. Senate, in Nashville, Tenn. (Aug. 5, 2019).

Finally, we would offer a third, more procedural, explanation: government continued to govern because that is what governments do. Legislatures legislate. Institutional processes and structures are in place so that bills are introduced and debated, committees meet, and laws pass, regardless of the surrounding chaos. The legislative institution is designed for multi-tasking. Committees allow them to consider dozens of bills at a time.<sup>238</sup> Legislators respond to hundreds of constituents' calls a day.<sup>239</sup> Various caucuses and interest groups move different issues forward simultaneously.<sup>240</sup> Just as it was able to with the scandals, the Virginia General Assembly proved itself fully capable of responding to the crises while simultaneously legislating and serving the people.<sup>241</sup> In spite of their varying responses to the three crises, House and Senate leaders played critical roles in keeping the General Assembly focused on its legislative purpose. .

<sup>238</sup> See generally *The Role of Committees in the Legislative Process*, U.S. SENATE, <https://www.senate.gov/general/Features/Committees.htm> (last visited Sept. 15, 2019).

<sup>239</sup> See generally *Correspondence with Congressional Offices 'Through the Roof'*, ROLL CALL (Jan. 25, 2018), <https://www.rollcall.com/news/politics/correspondence-congressional-offices-roof>.

<sup>240</sup> See generally Chris Micheli, *How Interest Groups Influence Policymaking*, CAP IMPACT (Mar. 12, 2018), <https://www.capimpactca.com/2018/03/interest-groups-influence-policymaking/>; Ben Paviour, *Investigation Finds Virginian Lawmakers Passed Nearly 100 'Copycat' Bills*, NPR (Apr. 5, 2019), <https://vp.m.org/news/articles/6481/investigation-finds-virginia-lawmakers-passed-nearly-100-copycat-bills>.

<sup>241</sup> See, e.g., Cox, *supra* note 167.

PREPARING FOR THE NEXT DECADE:  
EVALUATING THE POTENTIAL REDISTRICTING COMMISSION IN  
VIRGINIA

*Katherine R. Schroth\**

---

\* Kassie Schroth is a Vice President at McGuireWoods Consulting in the State Government Relations Group. B.A. Pennsylvania State University (2012), J.D. University of Richmond (2016).

## ABSTRACT

*For most of the past decade, Virginia has been wrapped up in a legal battle over racial gerrymandering in its House of Delegates district maps. At the same time, the legislature failed to pass a legislative fix to the districts in question and the Supreme Court of the United States denied the House of Delegates standing to defend its own districts. The next decade brings political uncertainty in Virginia the 2019 elections threaten Republican control in the General Assembly. It also brings a new census and the opportunity to redraw legislative districts in 2021. Virginia is now considering a new approach: a redistricting commission made up of legislators and citizen members. This article examines the legal battle over the 2011 district maps, past proposals for redistricting commissions in Virginia, the current legislation, and implementing a redistricting commission in Virginia's present political environment.*

## INTRODUCTION

Following a long legal battle, Virginia finally received clarity on its legislative districts in 2019 after the Supreme Court of the United States decided in *Virginia House of Delegates v. Bethune-Hill* (*Bethune-Hill*) that the Virginia House of Delegates does not have standing to represent the State's interest in a case that would impact its own elections.<sup>1</sup> With a slim Republican majority in both chambers, and competitive elections ahead, legislative districts play a pivotal role in the upcoming 2019 elections.<sup>2</sup> The new districts solidified by the Court's decision in *Bethune-Hill* change several district lines and put Republican incumbents, and their ability to hold the majority in the House of Delegates (the House), at risk.<sup>3</sup>

The 2020 census is quickly approaching and after it is complete, Virginia will reevaluate its legislative districts.<sup>4</sup> After an extensive lawsuit and political gridlock over districts in the legislature, Virginia has the opportunity to reform the redistricting process.<sup>5</sup> The 2019 General Assembly

<sup>1</sup> Va. House of Delegates v. Bethune-Hill, 139 S. Ct. 1945, 1950 (2019).

<sup>2</sup> See Timothy Williams, *Searching for Hints About 2020, All Eyes Turn to a Reshaped Virginia*, N.Y. TIMES (Aug. 19, 2019), <https://www.nytimes.com/2019/08/19/us/virginia-election-politics.html>.

<sup>3</sup> S.M., *The Supreme Court Sinks a Republican Gerrymander in Virginia*, ECONOMIST (June 18, 2019), <https://www.economist.com/democracy-in-america/2019/06/18/the-supreme-court-sinks-a-republican-gerrymander-in-virginia>.

<sup>4</sup> VA. CONST. art. II, § 6; *About the Census*, VA. COMPLETE COUNT COMM., <https://www.commonwealth.virginia.gov/advisory-boards/virginia-complete-count-commission/about-the-census/> (last visited Sept. 12, 2019).

<sup>5</sup> Tim Lau, *A Bipartisan Push for Redistricting Reform in Virginia*, BRENNAN CTR. FOR JUST. (Nov. 29, 2018), <https://www.brennancenter.org/blog/bipartisan-push-redistricting-reform-virginia>; Graham Moomaw, *Virginia House Passes Resolution to Create Independent Redistricting Commission*, RICH. TIMES-DISPATCH (Feb. 5, 2019), <https://www.richmond.com/news/virginia/government-politics/general->

passed, for the first time, a bill that would amend the Constitution of Virginia to create a redistricting commission separate from the current legislative process.<sup>6</sup>

This article examines legislation passed out of the 2019 Virginia General Assembly session that would create a redistricting commission. Part I provides a brief overview of the legal appeals and legislative inaction on Virginia's previous redistricting plan. Part II examines past legislative proposals for redistricting reform in Virginia. Part III reviews the redistricting commission bill passed by the General Assembly in 2019 and the next steps for the legislation, considering other states' redistricting commissions in this context. Part IV concludes the article by examining whether the political and legal environments in Virginia are favorable to an independent commission.

#### I. LEGAL BATTLES AND LEGISLATIVE GRIDLOCK SURROUNDING VIRGINIA'S LEGISLATIVE DISTRICTS

In 2011, Virginia adopted a new district map for the House of Delegates based on the 2010 census data.<sup>7</sup> The goal was to ensure that certain districts would have a Black voting-age population of at least 55 percent to maintain a minority voters' ability to elect their preferred candidates.<sup>8</sup> During this time, Republicans held a majority in the House of Delegates, and Democrats held a majority in the Senate of Virginia.<sup>9</sup> Republican Delegate Chris Jones championed the House plan.<sup>10</sup> The measure passed both chambers with a broad support, including most members of the Virginia Legislative Black Caucus.<sup>11</sup>

In 2014, registered voters in 12 majority-minority districts challenged the map under the Equal Protection Clause of the United States Constitution.<sup>12</sup> Members of the House of Delegates intervened in the case and successfully defended the district map in federal court.<sup>13</sup> The District Court found that each district withstood constitutional scrutiny under the

[assembly/virginia-house-passes-resolution-to-create-independent-redistricting-commission/article\\_49e70d4e-8cf3-559a-b80b-2654c64ed002.html](https://www.virginia.gov/newsroom/releases/2019/assembly/virginia-house-passes-resolution-to-create-independent-redistricting-commission/article_49e70d4e-8cf3-559a-b80b-2654c64ed002.html).

<sup>6</sup> S.J. Res. 306, 2019 Gen. Assemb., Reg. Sess. (Va. 2019).

<sup>7</sup> VA. CODE § 24.2-303.3, 304.03 (2019) (establishing districts for Virginia Senate and United States House of Representatives); H.B. 5005, 2011 Gen. Assemb., 1st Spec. Sess. (Va. 2011).

<sup>8</sup> *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 794 (2017).

<sup>9</sup> *Virginia General Assembly*, BALLOTPEdia, [https://ballotpedia.org/Virginia\\_General\\_Assembly](https://ballotpedia.org/Virginia_General_Assembly) (last visited Sept. 16, 2019).

<sup>10</sup> *Bethune-Hill*, 137 S. Ct. at 796.

<sup>11</sup> *Id.*

<sup>12</sup> *Bethune-Hill v. Va. State Bd. of Elections*, 141 F. Supp. 3d 505, 512 (E.D. Va. 2015).

<sup>13</sup> *Id.* at 510–11, 512.



Fourteenth Amendment's Equal Protection Clause.<sup>14</sup> The plaintiffs appealed to the United States Supreme Court.<sup>15</sup> The Court found that the lower court applied an incorrect legal standard in eleven of the twelve districts considered, and remanded the case for reconsideration as to whether race was used as predominate factor in drawing the districts.<sup>16</sup>

On remand, the District Court found that the 2011 Virginia House of Delegates redistricting plan violated the Equal Protection Clause.<sup>17</sup> Importantly, the District Court chose not to redraw the districts, but rather gave the General Assembly the opportunity to adopt a substitute measure to meet the constitutional requirements before October 30, 2018.<sup>18</sup>

### *A. 2018 Special Session*

Following the District Court's decision, Governor Ralph Northam called a special session of the General Assembly to tackle the remedial districting plan.<sup>19</sup>

One day before the Special Session was set to begin, Democrats filed a proposal for a redistricting plan that changed the lines of 29 districts.<sup>20</sup> Delegate Lamont Bagby, Chairman of the Virginia Legislative Black Caucus, sponsored the bill.<sup>21</sup> Republicans' initial reaction to the bill was that the plan favored Democrats and put Republicans into "unfriendly" districts.<sup>22</sup> Republican Majority Leader Todd Gilbert stated the map would likely result in the loss of at least five Republican seats and draw some Republican incumbents out of their districts entirely.<sup>23</sup>

<sup>14</sup> *Id.* at 571.

<sup>15</sup> *Bethune-Hill*, 137 S. Ct. at 794.

<sup>16</sup> *Bethune-Hill v. Va. State Bd. of Elections*, 326 F. Supp. 3d 128, 137 (E.D. Va. 2018).

<sup>17</sup> *Id.* at 181.

<sup>18</sup> *Id.*

<sup>19</sup> Press Release, Office of the Governor of Va., Governor Northam Calls for August 30th Special Session for General Assembly to Redraw House Delegates Districts (Aug. 20, 2018) (on file with the Virginia Office of the Governor).

<sup>20</sup> H.B. 7001, 2018 Gen. Assemb., 2d Spec. Sess. (Va. 2018).

<sup>21</sup> *Id.*

<sup>22</sup> Gregory Schneider, *Virginia Democrats Unveil Redistricting Plan Ahead of Session; GOP Leaders Balk*, WASH. POST (Aug. 29, 2018), [https://www.washingtonpost.com/local/virginia-politics/virginia-democrats-unveil-redistricting-plan-ahead-of-session-gop-leaders-balk/2018/08/29/01c2825c-abb3-11e8-b1da-ff7faa680710\\_story.html](https://www.washingtonpost.com/local/virginia-politics/virginia-democrats-unveil-redistricting-plan-ahead-of-session-gop-leaders-balk/2018/08/29/01c2825c-abb3-11e8-b1da-ff7faa680710_story.html).

<sup>23</sup> Graham Moomaw, *Democrats and Republicans Spar Over Va. House Redistricting, but Voting May Not Happen for Weeks*, RICH. TIMES-DISPATCH (Aug. 30, 2018), [https://www.richmond.com/news/virginia/government-politics/democrats-and-republicans-spar-over-va-house-redistricting-but-voting/article\\_249ea133-ec64-506b-b497-fd679fe6f2f9.html](https://www.richmond.com/news/virginia/government-politics/democrats-and-republicans-spar-over-va-house-redistricting-but-voting/article_249ea133-ec64-506b-b497-fd679fe6f2f9.html).

The Special Session offered nothing but tense political gridlock.<sup>24</sup> The Democrats' plan was met with harsh criticism from Republicans, and even one Democratic House member who called the plan a "self-serving political power grab".<sup>25</sup> Republicans had not yet offered a revised plan for the districts and would not do so until mid-September 2018.<sup>26</sup> After a lengthy hearing on Bagby's bill, the House of Delegates adjourned without a plan for addressing the unconstitutional districts and without a date to reconvene.<sup>27</sup>

On September 7, 2018, Governor Northam urged Speaker Kirk Cox to request the District Court for the Eastern District of Virginia to begin the remedial phase to draw new districts.<sup>28</sup> He stated, "I do not believe the General Assembly is likely to pass a constitutional map that I can sign."<sup>29</sup> The very same month, Speaker Cox and the other intervening members of the House of Delegates appealed the Eastern District's decision to the Supreme Court.<sup>30</sup> The Court agreed to hear the case in November.<sup>31</sup> Legal appeals and political gridlock left Virginia with a hazy path forward on its district maps for the upcoming 2019 elections.

### *B. Court Drawn Maps*

With no remedial plans adopted, the District Court appointed California professor Bernard Grofman as a special master to redraw the districts.<sup>32</sup> The report offered "narrowly tailored illustrative constitutional

<sup>24</sup> See Reema Amin & Marie Albiges, *Democrats, GOP Clash Over Redistricting Plan*, DAILY PRESS (Aug. 30, 2018), <https://www.dailypress.com/government/virginia/dp-nws-politics-redistricting-special-session-20180829-story.html> (discussing the effects of the "tense changes" the redistricting proposal would cause).

<sup>25</sup> *Id.* ("It's a self-serving political power grab," Heretick said of the proposal. "It's gerrymandering in response to gerrymandering.").

<sup>26</sup> See *Virginia Republicans Propose Their Own Redistricting Map*, U.S. NEWS (Sept. 18, 2018), <https://www.usnews.com/news/best-states/virginia/articles/2018-09-18/virginia-republicans-propose-their-own-redistricting-map>.

<sup>27</sup> See Amin & Albiges, *supra* note 24 (noting that the bill is still in "limbo" after the committee adjourned).

<sup>28</sup> Letter from Ralph Northam, Governor of Va., to the Honorable M. Kirkland Cox, Speaker of the House of Delegates of Va. (Sept. 7, 2018) (on file with the Virginia Office of the Governor).

<sup>29</sup> *Id.* This is not the first time a Governor has had to urge action from the legislature. Northam's letter expresses sentiments similar to a 2011 letter sent by then-Governor Bob McDonnell, which stated that the Senate would not agree to congressional redistricting legislation. See Letter from Bob McDonnell, Governor of Va., to the Honorable William J. Howell, Speaker of the House of Delegates of Va., and Honorable Richard L. Saslaw, Majority Leader of the Senate of Va. (June 21, 2011) (on file with the Virginia Office of the Governor).

<sup>30</sup> Dave Rens, *U.S. Supreme Court Will Consider Virginia GOP's Appeal on Gerrymandering Case - With a Catch*, DAILY PRESS (Nov. 13, 2018), <https://www.dailypress.com/government/dp-nws-scotus-house-redistricting-20181113-story.html>.

<sup>31</sup> *Id.*

<sup>32</sup> Gregory Schneider, *Federal Court Releases Plans for Possible Redistricting in Virginia, Refuses to Delay Process*, WASH. POST (Dec. 7, 2018), <https://www.washingtonpost.com/local/virginia->

remedies that are not drawn using race as a preponderant criterion.”<sup>33</sup> Grofman’s report stated the plans are “blind with respect to partisan outcomes.”<sup>34</sup> Overall, Grofman gave the court several options or modules, which he believed would correct the unconstitutional districts.<sup>35</sup>

With the pending appeal in the Supreme Court, Speaker Kirk Cox asked the Court to delay the lower court proceedings until the justices ruled on the case.<sup>36</sup> The Supreme Court denied that stay in early January 2019.<sup>37</sup> That same month, the U.S. Eastern District Court directed the special master to submit a Final Remedial Plan with using modules from his report.<sup>38</sup> The Department of Elections implemented the new districts that the District Court approved.<sup>39</sup> General Assembly approval was not required.<sup>40</sup>

### *C.Potential Political Consequences of the Court’s Maps*

These new districts appear to give Democrats a more favorable environment for the 2019 state elections.<sup>41</sup> For instance, House District 66, Speaker Kirk Cox’s district, moved thirty-two points to the left.<sup>42</sup> The Virginia Public Access Project categorizes five other Republican seats as harder to defend under the new map, including Delegate Chris Jones’ district. Delegate Jones carried the legislation for original district maps in 2011.<sup>43</sup> For Delegate David Yancey, whose 2017 race ended in a tie, the Court’s map created a more Democrat-leaning district by thirteen points.<sup>44</sup>

politics/federal-court-releases-plans-for-possible-redistricting-in-virginia-refuses-to-delay-process/2018/12/07/a1a58be6-f728-11e8-8d64-4e79db33382f\_story.html.

<sup>33</sup> BERNARD GROFMAN, REPORT OF THE SPECIAL MASTER: EXECUTIVE SUMMARY 6 (2018) (report submitted to the court in the case of Bethune-Hill v. Va. State Bd. of Elections, No. 3:14CV852, 2019 U.S. Dist. LEXIS 12464 (E.D. Va. Jan. 22, 2019)).

<sup>34</sup> *Id.* at 11–12.

<sup>35</sup> *Id.* at 7–10.

<sup>36</sup> Emergency Application for Stay Pending Resolution of Direct Appeal to this Court at 12, Va. House of Delegates v. Bethune-Hill, 139 S. Ct. 481 (2018) (No. 18-281).

<sup>37</sup> Order in Pending Case, Va. House of Delegates v. Bethune-Hill, 139 S. Ct. 481 (2018) (No. 18-281).

<sup>38</sup> Bethune-Hill v. Va. State Bd. of Elections, No. 3:14CV852, 2019 U.S. Dist. LEXIS 12464, at \*4 (E.D. Va. Jan. 22, 2019).

<sup>39</sup> See Final Minutes, Va. State Bd. of Elections (Feb. 22, 2019), <https://www.elections.virginia.gov/media/BoardPapers/Agendas/2019/20190222Minutes.pdf>.

<sup>40</sup> See Gregory S. Schneider, *Federal Judges Choose Va. Redistricting Map Favorable to Democrats; Six GOP House Districts would get Bluer*, WASH. POST (Jan. 23, 2019), [https://www.washingtonpost.com/local/virginia-politics/federal-judges-choose-va-redistricting-map-favorable-to-democrats-six-gop-house-districts-would-get-bluer/2019/01/22/401b2618-1ebc-11e9-9145-3f74070bbdb9\\_story.html?noredirect=on](https://www.washingtonpost.com/local/virginia-politics/federal-judges-choose-va-redistricting-map-favorable-to-democrats-six-gop-house-districts-would-get-bluer/2019/01/22/401b2618-1ebc-11e9-9145-3f74070bbdb9_story.html?noredirect=on) (explaining that the court would have control over redistricting).

<sup>41</sup> *Id.* (explaining that the court would have control over redistricting).

<sup>42</sup> *How Court Plan Would Affect Partisan Lean of Some House Districts*, VA. PUB. ACCESS PROJECT (Jan. 23, 2019), <https://www.vpap.org/updates/3177-how-court-plan-would-partisan-lean-some-house-districts/>.

<sup>43</sup> *Id.*

<sup>44</sup> *House of Delegates District 94*, VA. PUB. ACCESS PROJECT (Feb. 1, 2019), <https://www.vpap.org/offices/house-of-delegates-94/redistricting/>. Yancey was declared the winner in House District 94 after his

With the District Court maps in place, Republicans now must defend their majority in new districts that seemingly put them at a disadvantage.<sup>45</sup> The pending appeal in the Supreme Court was the last opportunity for Republicans to have another opportunity to defend the 2011 districts.<sup>46</sup>

#### *D. Supreme Court Solidifies Court Maps*

In March 2019, the Supreme Court heard oral arguments for the *Bethune-Hill* case.<sup>47</sup> The question at issue was whether the Virginia House of Delegates had standing to defend Virginia's redistricting plans.<sup>48</sup> In June, the Supreme Court handed down a decision, holding that "the House, as a single chamber of a bicameral legislature, has no standing to appeal the invalidation of the redistricting plans."<sup>49</sup>

Examining the reasoning of the Court's opinion is outside of the scope of this article, but the ultimate decision—that the members of the House lacked standing—meant that the multi-year challenge was finally over. This decision solidified that the districts drawn by the court-appointed special master, rather than the legislature, would stand for the 2019 elections.<sup>50</sup>

#### *E. Moving Forward*

The outcome of the elections under the new maps has yet to be determined, but what is certain is that, in 2020, the U.S. will conduct the next census, prompting the district lines to be reevaluated again.<sup>51</sup> Will Virginia spend another ten years arguing in court and debating in the legislature over perceived partisan and/or racial gerrymandering? Or, will Virginia create a new process to hopefully avoid its past legal troubles?

---

name was drawn out of a bowl in a tie-breaking drawing. Sarah McCammon, *Virginia Republican David Yancey Wins Tie-Breaking Drawing*, NPR (Jan. 4, 2018), <https://www.npr.org/2018/01/04/573504079/virginia-republican-david-yancey-wins-tie-breaking-drawing>.

<sup>45</sup> J.S., *How a New Congressional Map Could Turn Virginia's House Blue*, *ECONOMIST* (Mar. 1, 2019), <https://www.economist.com/democracy-in-america/2019/03/01/how-a-new-congressional-map-could-turn-virginias-house-blue>.

<sup>46</sup> *Id.*

<sup>47</sup> Va. House of Delegates v. Bethune-Hill, 139 S. Ct. 1945, 1950 (2019).

<sup>48</sup> *Id.* at 1949–50.

<sup>49</sup> *Id.* at 1950.

<sup>50</sup> See *id.* at 1950 n.1; see also *Bethune-Hill v. Va. State Bd. of Elections*, 368 F. Supp. 3d 872, 873, 889 (E.D. Va. 2019) (adopting the Final Remedial Plan submitted by the special master and directing it to be used in the 2019 election).

<sup>51</sup> *About the Census*, VA. COMPLETE COUNT COMM., <https://www.commonwealth.virginia.gov/advisory-boards/virginia-complete-count-commission/about-the-census/> (last visited Sept. 12, 2019).

## II. PREVIOUS PROPOSALS ON REDISTRICTING REFORM IN VIRGINIA

The idea of amending Virginia's redistricting process is not new. Over the past two decades, the legislature has considered many pieces of legislation.<sup>52</sup> The following section provides an overview of the major themes in the redistricting reform legislation that the legislature considered.

### *A. Studies*

When Virginia deliberates a controversial topic, the legislature will often propose an interim study to determine the best course of action moving forward.<sup>53</sup> Redistricting is no different.<sup>54</sup> Both Democrats and Republicans introduced various "study bills" to evaluate Virginia's redistricting process and alternatives over the years.<sup>55</sup>

In 2007, Republican Delegate Chris Peace sponsored House Joint Resolution 703, which directed a joint subcommittee, mostly made of up legislators, to examine the current process's impact on competitive elections and district criteria.<sup>56</sup> The resolution cites "[a] lack of competition in Virginia's legislative and congressional elections."<sup>57</sup> According to the resolution,

(i) only 38 of 100 House of Delegate races were contested by both major parties in 2005, only 11 races were decided by a margin of less than 10 percent, and only three incumbent members were defeated and (ii) only eight of 11 congressional district races were contested by both parties in 2004, the margin of victory was less than 20

<sup>52</sup> See Mary Spain, *Process, Population, and Law*, DRAWING THE LINE: REDISTRICTING IN VIRGINIA 2011 (Va. Div. Legislative Servs.), Aug. 2010, at 1 n.2 ("Since 2001 more than 40 constitutional amendments were offered to turn redistricting work over to an independent commission; 30 bills were introduced to create an advisory redistricting commission; and over a dozen resolutions were proposed to study the redistricting process."); see also Graham Moomaw, *General Assembly Approves Independent Redistricting Commission, Despite Objections from Black Lawmakers*, RICH. TIMES-DISPATCH (Feb. 23, 2019), [https://www.richmond.com/news/virginia/government-politics/general-assembly/general-assembly-approves-independent-redistricting-commission-despite-objections-from-black/article\\_b7c595db-503a-55d8-abb9-316c368ef9be.html](https://www.richmond.com/news/virginia/government-politics/general-assembly/general-assembly-approves-independent-redistricting-commission-despite-objections-from-black/article_b7c595db-503a-55d8-abb9-316c368ef9be.html) (highlighting the uncertainty and disagreements over the redistricting process in recent years).

<sup>53</sup> See, e.g., *Interim Studies & Commission Listings*, VA. GEN. ASSEMBLY, <https://studies.virginiageneralassembly.gov> (last visited Sept. 1, 2019).

<sup>54</sup> See S.B. 19, 2018 Gen. Assemb., Reg. Sess. (Va. 2018) (proposing that an interim redistricting commission would be established in the event any districts are found unconstitutional or unlawful).

<sup>55</sup> See, e.g., *id.*; see generally *Bethune-Hill v. Va. State Bd. of Elections*, 326 F. Supp. 3d 128, 137-38 (E.D. Va. 2018) (indicating that there can bipartisan support for matters concerning redistricting).

<sup>56</sup> H.D.J. Res. 703, 2007 Gen. Assemb., Reg. Sess. (Va. 2007).

<sup>57</sup> *Id.*

percent in only one congressional race, that of the Second District where the margin was 10 percent, and no incumbents were defeated.<sup>58</sup>

Despite these interesting statistics on the lack of competitiveness in Virginia's elections, the measure was left in committee and was not passed.<sup>59</sup> Democratic Delegate Brian Moran introduced a similar resolution the following year.<sup>60</sup> The bill met the same fate and was left in committee.<sup>61</sup>

### *B.Redistricting Commission Proposals*

Almost every year, at least one legislator sponsors a bill to amend the Virginia Constitution and create a redistricting commission.<sup>62</sup> The proposed commissions differ in size, how members are appointed, and member composition.<sup>63</sup>

### *C.Finding the Right Number*

Proposals for redistricting commissions have varied widely in size.<sup>64</sup> A bill introduced in multiple years would have created a five-person commission to prepare redistricting plans.<sup>65</sup> Other bills propose a seven-member commission.<sup>66</sup> Some legislators sponsored 13-member

<sup>58</sup> *Id.*

<sup>59</sup> See H.D.J. Res. 703, 2007 Gen. Assemb., Reg. Sess. (Va. 2007).

<sup>60</sup> H.D.J. Res. 103, 2008 Gen. Assemb., Reg. Sess. (Va. 2008).

<sup>61</sup> See *id.*

<sup>62</sup> See, e.g., S.J. Res. 119, 2016 Gen. Assemb., Reg. Sess. (Va. 2016); S.B. 446, 2012 Gen. Assemb., Reg. Sess. (Va. 2012); S.B. 932, 2011 Gen. Assemb., Reg. Sess. (Va. 2011); S.B. 296, 2010 Gen. Assemb., Reg. Sess. (Va. 2010); S.J. Res. 312, 2009 Gen. Assemb., Reg. Sess. (Va. 2009); H.D.J. Res. 28, 2009 Gen. Assemb., Reg. Sess. (Va. 2008).

<sup>63</sup> Compare, e.g., H.D.J. Res. 28, 2009 Gen. Assemb., Reg. Sess. (Va. 2008) (proposing a commission of only five members, which are chosen by the Chief Justice of the Supreme Court of Virginia from a list of names picked by political parties), with S.J. Res. 119, 2016 Gen. Assemb., Reg. Sess. (Va. 2016) (proposing a commission of seven members, taking into account geographic diversity and family ties with the General Assembly, chosen from a list of retired judges, and appointed by a majority vote of the entire Supreme Court of Virginia).

<sup>64</sup> Compare, e.g., H.D.J. Res. 28, 2009 Gen. Assemb., Reg. Sess. (Va. 2008) (five-member proposed Commission), with H.D.J. Res. 628, 2017 Gen. Assemb., Reg. Sess. (Va. 2017) (thirteen-member proposed Commission).

<sup>65</sup> S.B. 932, 2011 Gen. Assemb., Reg. Sess. (Va. 2011); S.B. 296, 2010 Gen. Assemb., Reg. Sess. (Va. 2010); S.J. Res. 312, 2009 Gen. Assemb., Reg. Sess. (Va. 2009); H.D.J. Res. 28, 2009 Gen. Assemb., Reg. Sess. (Va. 2008); H.D.J. Res. 719, 2007 Gen. Assemb., Reg. Sess. (Va. 2007); H.D.J. Res. 698, 2005 Gen. Assemb., Reg. Sess. (Va. 2005).

<sup>66</sup> S.J. Res. 119, 2016 Gen. Assemb., Reg. Sess. (Va. 2016); H.D.J. Res. 117, 2016 Gen. Assemb., Reg. Sess. (Va. 2016); H.D.J. Res. 93, 2016 Gen. Assemb., Reg. Sess. (Va. 2016); S.B. 446, 2012 Gen. Assemb., Reg. Sess. (Va. 2012); H.B. 831, 2012 Gen. Assemb., Reg. Sess. (Va. 2012); S.B. 173, 2010 Gen. Assemb., Reg. Sess. (Va. 2010); S.B. 626, 2010 Gen. Assemb., Reg. Sess. (Va. 2010); H.B. 179, 2010 Gen. Assemb., Reg. Sess. (Va. 2010); H.B. 638, 2010 Gen. Assemb., Reg. Sess. (Va. 2010).

commissions.<sup>67</sup> There seems to be no consensus on right number of members for a redistricting commission.<sup>68</sup>

#### *D.Appointment Power*

Who appoints members differs just as much as the number of commission members.<sup>69</sup> Most of the bills allow the President pro tempore of the Senate, the Speaker of the House of Delegates, and the minority leaders to each appoint a member of the Commission.<sup>70</sup> This approach gives both political parties equal representation to the Commission.<sup>71</sup>

Other bills delegate appointment powers outside of the House and Senate.<sup>72</sup> For example, Senate Bill 173 from the 2010 session allows the chairs of the state political party committees that received the highest and next highest number of votes in the last gubernatorial election to appoint members.<sup>73</sup> A bill from 2016 tasks the Executive Director of the Division of Legislative Services to select the Commission members.<sup>74</sup>

Delegating the appointments to the Supreme Court of Virginia appears in several bills.<sup>75</sup> In House Joint Resolution 113 from 2010, the most recently retired Chief Justice of the Virginia Supreme Court appoints all eleven members of the Commission.<sup>76</sup> Other bills demand that a majority

<sup>67</sup> S.J. Res. 51, 2018 Gen. Assemb., Reg. Sess. (Va. 2018); H.D.J. Res. 628, 2017 Gen. Assemb., Reg. Sess. (Va. 2017); S.J. Res. 269, 2017 Gen. Assemb., Reg. Sess. (Va. 2017); H.D.J. Res. 96, 2016 Gen. Assemb., Reg. Sess. (Va. 2016); S.J. Res. 60, 2016 Gen. Assemb., Reg. Sess. (Va. 2016).

<sup>68</sup> See Graham Moomaw, *General Assembly Approves Independent Redistricting Commission, Despite Objections from Black Lawmakers*, RICH. TIMES-DISPATCH, (Feb. 23, 2019), [https://www.richmond.com/news/virginia/government-politics/general-assembly/general-assembly-approves-independent-redistricting-commission-despite-objections-from-black/article\\_b7c595db-503a-55d8-abb9-316c368ef9be.html](https://www.richmond.com/news/virginia/government-politics/general-assembly/general-assembly-approves-independent-redistricting-commission-despite-objections-from-black/article_b7c595db-503a-55d8-abb9-316c368ef9be.html) (explaining that the House of Delegates' plan was "dramatically different" from the Senate's plan).

<sup>69</sup> Compare H.D.J. Res. 28, 2009 Gen. Assemb., Reg. Sess. (Va. 2008) (proposing that each political party in the General Assembly proffer a list of potential members), with H.D.J. Res. 205, 2016 Gen. Assemb., Reg. Sess. (Va. 2016) (proposing that the Executive Director of the Division of Legislative Services appoint Commission members).

<sup>70</sup> See, e.g., S.B. 173, 2010 Gen. Assemb., Reg. Sess. (Va. 2010); S.B. 296, 2010 Gen. Assemb., Reg. Sess. (Va. 2010); S.B. 626, 2010 Gen. Assemb., Reg. Sess. (Va. 2010).

<sup>71</sup> See Moomaw, *supra* note 68.

<sup>72</sup> See, e.g., H.D.J. Res. 205, 2016 Gen. Assemb., Reg. Sess. (Va. 2016) (granting some appointment power to the Executive Director of the Division of Legislative Services); S.B. 173, 2010 Gen. Assemb., Reg. Sess. (Va. 2010) (delegating some appointment powers to the political parties whose candidates received the largest and next-largest number of votes in the most recent gubernatorial election).

<sup>73</sup> S.B. 173, 2010 Gen. Assemb., Reg. Sess. (Va. 2010).

<sup>74</sup> H.D.J. Res. 205, 2016 Gen. Assemb., Reg. Sess. (Va. 2016).

<sup>75</sup> See, e.g., H.D.J. Res. 651, 2017 Gen. Assemb., Reg. Sess. (Va. 2017); H.B. 831, 2012 Gen. Assemb., Reg. Sess. (Va. 2012); H.D.J. Res. 113, 2010 Gen. Assemb., Reg. Sess. (Va. 2010); H.B. 179, 2010 Gen. Assemb., Reg. Sess. (Va. 2010).

<sup>76</sup> H.D.J. Res. 113, 2010 Gen. Assemb., Reg. Sess. (Va. 2010).

vote of the Supreme Court appoint the members from a list of retired judges who are willing to serve on the Commission.<sup>77</sup>

Each of these approaches provides a different opportunity for constructing the Commission. With legislative appointees, it is probable that that legislature would appoint someone with similar interests to their party. When the Supreme Court appoints members, the hope is to take the partisan politics out of the picture.<sup>78</sup> This type of selection is an attempt to remove the legislature's partisan nature from influencing the Commission.<sup>79</sup>

### *E. Commission Membership*

Virginia's past proposals require various types of people to serve on the Commission.<sup>80</sup> This includes individuals affiliated with political parties,<sup>81</sup> state officials,<sup>82</sup> judges,<sup>83</sup> independent persons,<sup>84</sup> and others.<sup>85</sup> Just like other logistical aspects, there is little consensus around the ideal redistricting commission membership.

In past sessions, the correct number of members, who appoints them, and who they are, all seemed to be elusive points for the Virginia legislature.<sup>86</sup> Some of these proposals may have influenced the redistricting

<sup>77</sup> See, e.g., H.D.J. Res. 651, 2017 Gen. Assemb., Reg. Sess. (Va. 2017); H.B. 831, 2012 Gen. Assemb., Reg. Sess. (Va. 2012); H.B. 179, 2010 Gen. Assemb., Reg. Sess. (Va. 2010).

<sup>78</sup> See Alan Suderman, *Virginia Lawmakers Back Redistricting Commission*, AP NEWS (Feb. 23, 2019), <https://www.apnews.com/9e03b37e51264a458946d466047d65bd> (explaining that a redistricting commission involving the Supreme Court of Virginia would "end partisan gerrymandering in Virginia.").

<sup>79</sup> See H.B. 831, 2012 Gen. Assemb., Reg. Sess. (Va. 2012) (emphasizing the nonpartisan nature of the proposed bill); *id.*

<sup>80</sup> See H.D.J. Res. 21, 2018 Gen. Assemb., Reg. Sess. (Va. 2018); H.D.J. Res. 205, 2016 Gen. Assemb., Reg. Sess. (Va. 2016); S.J. Res. 284, 2015 Gen. Assemb., Reg. Sess. (Va. 2015).

<sup>81</sup> S.J. 374, 2019 Gen. Assemb., Reg. Sess. (Va. 2019); see also S.J. Res. 284, 2015 Gen. Assemb., Reg. Sess. (Va. 2015) (stating that of the twelve commission members appointed, half will be appointed by the political party that holds the most seats in the Senate, holds the most seats in the House, and received the most votes in the most recent gubernatorial election; the other half will be appointed by the political party that received the second most number of seats or votes in the most recent gubernatorial election).

<sup>82</sup> H.D.J. Res., 2018 Gen. Assemb., Reg. Sess. (Va. 2018) (stating that of the seven commission members appointed, three shall be independent public officials- the Auditor of Public Accounts, the State Inspector General, and the Executive Director of the Virginia State Bar).

<sup>83</sup> H.D.J. Res. 651, 2017 Gen. Assemb., Reg. Sess. (Va. 2017); H.D.J. Res. 702, 2009 Gen. Assemb., Reg. Sess. (Va. 2009).

<sup>84</sup> H.D.J. Res. 584, 2015 Gen. Assemb., Reg. Sess. (Va. 2015).

<sup>85</sup> H.D.J. Res. 205, 2016 Gen. Assemb., Reg. Sess. (Va. 2016) ("The members of the Commission shall include (i) a demographer; (ii) a cartographer; (iii) an applied mathematician; (iv) a computer scientist; and (v) a lawyer or legal expert who specializes in election and redistricting law.").

<sup>86</sup> See, e.g., H.D.J. Res., 2018 Gen. Assemb., Reg. Sess. (Va. 2018) (stating that there shall be seven members, with three being independent); H.D.J. Res. 651, 2017 Gen. Assemb., Reg. Sess. (Va. 2017) (stating that there shall be seven members, all retired judges); H.D.J. Res. 205, 2016 Gen. Assemb., Reg. Sess. (Va. 2016) (stating that there shall be five members, and spelling out each of their required areas of expertise); S.J. Res. 284, 2015 Gen. Assemb., Reg. Sess. (Va. 2015) (stating that there shall be twelve members of the commission made up of political appointments).



commission bill passed during the General Assembly session in 2019.<sup>87</sup> The next section discusses the current proposal.

### III. CURRENT PROPOSAL TO REFORM VIRGINIA'S REDISTRICTING PROCESS

The Virginia General Assembly passed a bill to create a redistricting commission in 2019, thus completing the first step to redistricting reform.<sup>88</sup> This bill is somewhat similar to past proposals, but ultimately, it allows the General Assembly to retain some power of the process and Commission members, while leaving the responsibility of drawing the districts to the Commission.<sup>89</sup>

#### *A. Commission Members*

The Commission will consist of sixteen members: eight members of the legislature, and eight citizen members.<sup>90</sup>

The eight members of the legislature include four members of the House of Delegates and four members from the Senate.<sup>91</sup> The majority and minority party in both chambers will appoint two members respectively.<sup>92</sup>

Rather than allowing the General Assembly to directly appoint the citizen members, the bill requires a Redistricting Commission Selection Committee (the Committee) comprised of five retired judges from the Circuit Court of Virginia to appoint citizen members.<sup>93</sup> The Chief Justice of the Supreme Court of Virginia will provide a list of retired judges to the Speaker of the House, the minority leader of the House, the President pro tempore of the Senate, and the Senate minority leader.<sup>94</sup> Each of these members will select a judge from the list to serve on the Committee.<sup>95</sup> Then, the four members of the Committee will select a fifth member from the list.<sup>96</sup>

<sup>87</sup> Compare Act of Feb. 23, 2019, ch. 824, 2019 Va. Acts 1–2 (designating how many commission appointments each political party gets), with S.J. Res. 284, 2015 Gen. Assemb., Reg. Sess. (Va. 2015) (suggesting political party appointments for the commission with similar language).

<sup>88</sup> Act of Feb. 23, 2019, ch. 824, 2019 Va. Acts 1.

<sup>89</sup> *Id.* at 1, 2.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 1.

<sup>92</sup> *Id.* at 1–2.

<sup>93</sup> *Id.* at 2.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

2019]

PREPARING FOR THE NEXT DECADE

69

The Speaker of the House, the House minority leader, the President pro tempore of the Senate, and the Senate minority leader provide four lists from which citizen members are chosen.<sup>97</sup> Each list must have at least sixteen candidates (the General Assembly will establish the criteria for citizen candidate eligibility).<sup>98</sup> The Committee must select two citizen members from each list with a majority vote.<sup>99</sup>

### *B.Redistricting Process*

The bill requires the Commission to create a proposed plan for the districts the House of Delegates, and Senate of Virginia based on the 2020 census data.<sup>100</sup> The Commission's proposed plan must receive affirmative votes from at least six legislative members and six citizen members.<sup>101</sup> For each chamber's districts, three of the six affirmative legislator votes must be from members of that chamber.<sup>102</sup>

Once the Commission approves the district plans, the plans for the House and Senate districts must be voted on in one bill by the General Assembly.<sup>103</sup> No amendments are permitted.<sup>104</sup> If the General Assembly does not pass the bill, the Commission must submit a new plan within fourteen days.<sup>105</sup> If the General Assembly rejects the new plan, the Supreme Court will establish the districts.<sup>106</sup>

### *C.Transparency Measures*

There is a strong public participation component to the Commission's work. The Commission is required to have at least three meetings around the Commonwealth to receive public comment on the redistricting process.<sup>107</sup> All meetings and records of the Commission are open to the public.<sup>108</sup> All records and documents of the Commission, including records from anyone advising the Commission, will be public information.<sup>109</sup> It is expected that these meetings and records will be highly scrutinized. The bill

---

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 2–3.

<sup>109</sup> *Id.*

also allows groups or individuals to advise the Commission on crafting proposed plans.<sup>110</sup>

#### *D. More Explicit Redistricting Requirements*

Today, the Constitution of Virginia only requires that electoral districts be drawn to give representation in proportion to the population in each district.<sup>111</sup> Under the new proposal, the Constitution is amended to require:

Every electoral district be drawn in accordance with the requirements of federal and state laws that address racial and ethnic fairness, including the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and provisions of the Voting Rights Act of 1965, as amended, and judicial decisions interpreting such laws. Districts shall provide, where practicable, opportunities for racial and ethnic communities to elect candidates of their choice.<sup>112</sup>

This language reiterates that the Commission should abide by all federal and state requirements on racial and ethnic fairness when drawing districts, which could help minority communities and potentially avoid litigation in the future..<sup>113</sup>

#### *E. Retaining and Removing Control*

The bill reflects a balance of the General Assembly retaining some power over the process and removing control by delegating the ultimate responsibility of drawing the districts to the Commission.<sup>114</sup>

#### *F. Retaining Control*

Although the purpose of the Commission is to remove politics from the process, the General Assembly does not totally give up its current redistricting power.<sup>115</sup> The legislature appoints its own members to the Commission, chooses the retired judges for the Committee, and proposes the citizen members.<sup>116</sup> With these elements, the Commission will still have partisan interests participating in the redistricting process.<sup>117</sup>

---

<sup>110</sup> *Id.* at 3.

<sup>111</sup> VA. CONST. art. II, § 6.

<sup>112</sup> Act of Feb. 23, 2019, ch. 824, 2019 Va. Acts 1.

<sup>113</sup> *See id.*

<sup>114</sup> *See id.*

<sup>115</sup> *See id.*

<sup>116</sup> *Id.* at 1–2.

<sup>117</sup> *See id.*

Because the bill requires three of the four House or Senate members to approve their own chamber's plan, the legislators on the Commission have the definitive vote for the proposed plans.<sup>118</sup> The citizen members cannot unilaterally approve the proposed plans.<sup>119</sup>

Finally, the Commission's plan must be returned to the General Assembly for approval.<sup>120</sup> All of these measures allow the legislature (and therefore both major political parties) to have an important role in every step of the redistricting process.

### *G. Removing Control*

The bill, however, removes some important control from the legislature.<sup>121</sup> While the Senate and House propose lists of citizen members, the Committee ultimately decides on only two from each list.<sup>122</sup> The bill prohibits members or employees of Congress of the United States or the General Assembly from serving as citizen members.<sup>123</sup> There are an equal number of legislators and citizen members, so the legislators cannot pass a district plan unilaterally.<sup>124</sup>

Arguably, one of the most important aspects of the Commission memberships is that the majority and minority parties are both represented equally on the Commission.<sup>125</sup> Currently, the party in power in both the Senate and House dictate the procedure and proposed plans for the districts.<sup>126</sup> The majority party has no advantage under this plan. Even citizen members are selected equally from the lists of the majority and minority parties.<sup>127</sup> In theory, the proposal forces some consensus between political parties. For instance, at least three of the four legislators appointed from the House, and three of the four legislators from the Senate, must approve their own chamber's plan.<sup>128</sup> Because the majority and minority parties each appoint two members, at least one member must agree with the opposing political party.<sup>129</sup> In Virginia's current process, the majority party can totally

---

<sup>118</sup> *See id.* at 2.

<sup>119</sup> *See id.*

<sup>120</sup> *See id.*

<sup>121</sup> *See id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *See id.* at 1.

<sup>126</sup> *See* VA. CONST. art. II, § 6 (stating that the General Assembly controls the districting process).

<sup>127</sup> Act of Feb. 23, 2019, ch. 824, 2019 Va. Acts 2.

<sup>128</sup> *Id.*

<sup>129</sup> *See id.* at 1, 2.

control the redistricting process.<sup>130</sup> This is not so under the 2019 proposal. Consensus (in some form) between members is essentially mandated.<sup>131</sup>

Under this bill, as a whole, the General Assembly has relinquished its ability to have any input as to the districts, other than an up or down vote, on the proposed plan.<sup>132</sup> The legislature cannot approve only one plan, nor can it make any amendments.<sup>133</sup> If it does not agree with the Commission's plan or subsequent revised plan, the Supreme Court of Virginia will draw the districts.<sup>134</sup> The General Assembly has no power to reject the Supreme Court's plan.<sup>135</sup> The ability to draw districts independently never reverts the General Assembly.<sup>136</sup>

With this bill, the legislature retains a strong influence over the Commission but is ultimately bound by the Commission's plan or the districts that the Supreme Court draws.<sup>137</sup>

#### IV. NEXT STEPS FOR REDISTRICTING REFORM

Implementing redistricting reform in Virginia will not be immediate.<sup>138</sup> In order for the legislation to become law, the General Assembly will need to pass the 2019 proposal again in 2020, and Virginia voters must then approve the proposal on the 2020 ballot.<sup>139</sup> The legislature will also pass enabling legislation to implement the Redistricting Commission.<sup>140</sup>

The bill, which is quite detailed, still leaves some procedural questions unanswered. Most importantly, the criteria for the Commission's citizen members remain an open question.<sup>141</sup> The measure allows the General

<sup>130</sup> See VA. CONST. art. II, § 6 (stating that the General Assembly controls the districting process).

<sup>131</sup> See Acts of Feb. 23, 2019, ch. 824, 2019 Va. Acts 1.

<sup>132</sup> See *id.*

<sup>133</sup> *Id.* at 2.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> See *id.*

<sup>138</sup> See BRENNAN CTR. FOR JUSTICE, OVERVIEW: VIRGINIA REDISTRICTING REFORM AMENDMENT (HJ615/SJ306) 3–4 (2019), <https://www.brennancenter.org/analysis/overview-virginia-redistricting-reform-amendment-hj615sj306>.

<sup>139</sup> *Id.* at 1.

<sup>140</sup> A.E. Dick Howard, *Column: Redistricting Commission Amendment is a Landmark, But Work Remains to Put it in the Virginia Constitution*, RICH. TIMES-DISPATCH (Mar. 18, 2019), [https://www.richmond.com/opinion/their-opinion/guest-columnists/a-e-dick-howard-column-redistricting-commission-amendment-is-a/article\\_1c2a5c05-ff05-5c57-90f8-f9b5ff99bd69.html](https://www.richmond.com/opinion/their-opinion/guest-columnists/a-e-dick-howard-column-redistricting-commission-amendment-is-a/article_1c2a5c05-ff05-5c57-90f8-f9b5ff99bd69.html).

<sup>141</sup> See Act of Feb. 23, 2019, ch. 824, 2019 Va. Acts 2 (noting citizen member requirement but leaving eligibility criteria for citizen members up to the General Assembly's discretion at a later point in time).

2019]

PREPARING FOR THE NEXT DECADE

73

Assembly to establish criteria for citizen members and we have little insight at this time as to whom the legislature will deem eligible.<sup>142</sup>

When we look at other commissions with citizen members in Virginia, the law often requires representation from different interest groups.<sup>143</sup> For instance, Virginia's Broadband Advisory Council, which advises the Governor on policy and funding priorities to expedite deployment and reduce the cost of broadband access, has several citizen members.<sup>144</sup> The citizen members must represent the Virginia Cable Telecommunications Association, Virginia Telecommunications Industry Association, a representative of local government recommended that the Virginia Municipal League and Virginia Association of Counties recommends, a representative of a wireless service authority, and a representative of the Virginia, Maryland and Delaware Association of Electric Cooperatives.<sup>145</sup> Each group has expertise in or impacted by the broadband industry.<sup>146</sup>

Looking at past redistricting legislation, at least one proposal required commission members to be a panel of experts.<sup>147</sup> House Joint Resolution 205 from the 2016 session specifically required the following individuals to serve on the commission: a demographer, a cartographer, an applied mathematician, a computer scientist, and a lawyer or legal expert who specializes in election and redistricting law.<sup>148</sup>

Another bill from 2008 requires the Commission to include (in part) a representative from a public policy center at one of the Commonwealth's public institutions of higher education and a local government official.<sup>149</sup> The only stipulation set out in the bill passed in 2019 is that a citizen member may not be a member or employee of the General Assembly or U.S. Congress.<sup>150</sup>

The Redistricting Commission Selection Committee (the Committee) can only appoint two citizens from each of the four lists provided by the majority and minority parties in the General Assembly.<sup>151</sup> With this type

<sup>142</sup> *Id.*

<sup>143</sup> See, e.g., VA. CODE § 2.2-1519 (2019) (requiring citizen members of the Virginia Commission on Higher Education Board come from various educational groups); VA. CODE § 2.2-2609 (2019) (requiring that each citizen member of the Blue Ridge Regional Tourism Council be from a different destination marketing organization).

<sup>144</sup> VA. CODE § 2.2-2699.3(B) (2019).

<sup>145</sup> *Id.*

<sup>146</sup> See *id.*

<sup>147</sup> See H.D.J. Res. 205, 2016 Gen. Assemb., Reg. Sess. (Va. 2016).

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> Act of Feb. 23, 2019, ch. 824, 2019 Va. Acts 2.

<sup>151</sup> *Id.*

of limited selection, the logistical ability requiring specific interests or groups to be represented on the Commission could be nearly impossible. It is more likely the General Assembly will establish general criteria for eligible citizen members. However, even with general conditions, Virginia could take many different approaches. In several other states with redistricting commissions, there are efforts to restrict political activity to keep citizen members nonpartisan.<sup>152</sup> If Virginia wants citizen members without political biases, it can look to other states as examples.

New Jersey has one “independent member” of its redistricting commission.<sup>153</sup> This member is required to be a resident of the state of New Jersey for the preceding five years, and cannot have held a public or party office in New Jersey during that time.<sup>154</sup>

In Washington, past, present, and future political activities are prohibited to a certain degree.<sup>155</sup> Elected officials, or anyone who was an elected official or party officer within two years of his or her appointment, may not serve on the commission.<sup>156</sup> Additionally, persons are ineligible to serve on the commission if the person is not a registered voter in Washington, or was a registered lobbyist in the last year.<sup>157</sup> Washington also prohibits political activity while serving on the commission. Commission members may not run for office, actively participate or contribute to any political campaign or candidate, or hold or campaign for a seat in the state House of Representatives, the state Senate, or Congress for two years after the effective date of the district plan.<sup>158</sup>

California also restricts politically-involved individuals from serving on the state’s commission.<sup>159</sup> California chooses members of its redistricting commission through an applicant pool.<sup>160</sup> Applicants with a “conflict of interest” must be removed from the pool.<sup>161</sup> Conflicts of interest include various political activities within the last ten years, such as: running for or holding a federal or state office; serving as an officer, employee or paid consultant of a political party; being a registered federal, state, or local

<sup>152</sup> See Alexis Farmer & Annie Lo, *Citizen and Legislative Efforts to Reform Redistricting in 2018*, TRUTHOUT (Oct. 16, 2018), <https://truthout.org/articles/citizen-and-legislative-efforts-to-reform-redistricting-in-2018/>.

<sup>153</sup> N.J. CONST. art. II, § 2(1)(c).

<sup>154</sup> *Id.*

<sup>155</sup> WASH. CONST. art. II § 43(3).

<sup>156</sup> *Id.*

<sup>157</sup> WASH. REV. CODE § 44.05.050 (2019).

<sup>158</sup> *Id.* § 44.05.060.

<sup>159</sup> CAL. GOV’T CODE § 8252(a) (West 2019).

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

lobbyist; and contributing two thousand dollars or more to a candidate for public office.<sup>162</sup>

The overarching theme of these states' criteria is to avoid citizen members that would be an obvious proxy for one party or the other.<sup>163</sup> Avoiding lobbyists, party officials, political donors, and elected officials creates a sense of nonpartisanship or insulation from political influence in the citizen members.<sup>164</sup> Nonpartisan members are, in theory, less likely to draw districts that overtly favor one party over another.<sup>165</sup>

One counterargument to any such restrictions on political activity is that those with political experience may be more familiar with the redistricting process.<sup>166</sup> The General Assembly should carefully weigh the aspects of nonpartisanship with potential for experience and depth of knowledge of the process.<sup>167</sup> Restricting past legislators, party officials, or those involved in the political process could remove potential institutional knowledge from the redistricting process.<sup>168</sup>

Unless the legislature places similar restrictions on political activity, it is unlikely that selected citizen members will be totally nonpartisan.<sup>169</sup> By the very nature of Virginia's plan, in which members of the legislature draft lists of citizen members, legislators have the opportunity to put citizens on the Commission who may favor one political party.<sup>170</sup> It would be foolish to think that the legislators would put forth a name they do not believe is at least somewhat likely to vote in their favor.<sup>171</sup> Depending on eligibility criteria for citizen members that Virginia decides to implement, there may be few completely nonpartisan voices on the Commission.<sup>172</sup> If Virginia wants a sense of nonpartisanship on its Commission, the legislature should carefully consider balancing the benefits of having experts and

<sup>162</sup> *Id.*

<sup>163</sup> Justin Levitt, *Essay: Weighing the Potential of Citizen Redistricting*, 44 LOY. L.A. L. REV. 513, 537 (2011).

<sup>164</sup> *Id.* (“[These restrictions] are designed to ensure that a citizens' redistricting body does not become an exercise actually conducted by legislators with citizen stand-ins”).

<sup>165</sup> See generally *id.* at 530–31 (arguing that states should give redistricting power to nonpartisan “experienced technocrats.”).

<sup>166</sup> See *id.* at 540–41.

<sup>167</sup> See *id.* at 539–42.

<sup>168</sup> See *id.* at 540.

<sup>169</sup> See *id.* at 537.

<sup>170</sup> See Act of Feb. 23, 2019, ch. 824, 2019 Va. Acts 2.

<sup>171</sup> See Levitt, *supra* note 163, at 537 (“[L]egislative leaders with the ability to choose commissioners will certainly select like-minded citizens, including citizens with similar partisan objectives”).

<sup>172</sup> See generally *id.* (“[I]t is to be expected that a redistricting commission will engage in the substantially political task of reconciling competing values – and that in doing so, the commissioners will incorporate, among incorporate... partisan aims either explicitly or *sub silentio*.”)



both non-partisan and politically involved persons as it establishes the criteria for the Commission's citizen members.

*A. Potential Legal Issue on Citizen Member Eligibility*

A pending legal challenge could influence Virginia's criteria for citizen members.<sup>173</sup> On July 30, 2019, fifteen Michigan residents filed a federal lawsuit aimed at invalidating the state's redistricting commission.<sup>174</sup> The plaintiffs argue that the Michigan Citizens Redistricting Commission (MCRC) unconstitutionally excludes Michigan citizens from serving on the MCRC "if they have engaged in certain categories of constitutionally protected activity deemed to be 'partisan' in nature."<sup>175</sup>

Michigan's Redistricting Commission is the product of Proposal 2, a constitutional amendment to establish a citizen redistricting commission.<sup>176</sup> The measure passed in 2018.<sup>177</sup> The provision includes eligibility criteria that requires, in part, that each Commissioner not currently be, or have been in the past six years:

- A declared candidate for partisan federal, state, or local office;
- An elected official to partisan federal, state, or local office;
- An officer or member of the governing body of a national, state, or local political party;
- A paid consultant or employee of a federal, state, or local elected official; or a political candidate, of a federal, state, or local political candidate's campaign; or of a political action committee;
- An employee of the legislature;
- Any person who is registered as a lobbyist agent with the Michigan bureau of elections, or any employee of such person.<sup>178</sup>

<sup>173</sup> Complaint for Declaratory and Injunctive Relief at 2, Daunt et. al. v. Benson, No. 1:19-cv-00614 (W.D. Mich. July 30, 2019).

<sup>174</sup> *Id.* at 3.

<sup>175</sup> *Id.* at 2.

<sup>176</sup> See MICH. HOUSE FISCAL AGENCY, "VOTERS NOT POLITICIANS" PETITION/INDEPENDENT REDISTRICTING COMMISSION (2018).

<sup>177</sup> Paul Egan, *Michigan Voters Approve Anti-Gerrymandering Proposal 2*, DET. FREE PRESS (Nov. 7, 2018), <https://www.freep.com/story/news/politics/elections/2018/11/06/proposal-2-michigan-gerrymandering/1847078002/>. A group called Citizens Protecting Michigan's Constitution filed a lawsuit in 2018 to remove Proposal 2 from the ballot. The case eventually went to the Michigan Supreme Court, which ruled in favor of state, allowing the proposal to remain on the 2018 ballot. Citizens Protecting Mich.'s Constitution v. Sec'y of State, 914 N.W. 2d 360 (Mich. July 16, 2018).

<sup>178</sup> MICH. CONST. art. IV, § 6(1)(b).

All of the plaintiffs may not serve on the MCRC because they fall into one or more of these categories.<sup>179</sup> The plaintiffs allege, “ineligibility violates the First Amendment to the United States Constitution and denies Plaintiffs equal protection of law under the Fourteenth Amendment.”<sup>180</sup> The complaint calls for the court to invalidate the MCRC and block its implementation.<sup>181</sup>

The plaintiffs argue a violation of the First Amendment on the fact they have been excluded based on “their exercise of one or more of their constitutionally protected interests, *i.e.*, freedom of speech (*e.g.*, by the exclusion of candidates for partisan office), right of association (*e.g.*, by the exclusion of members of a governing body of a political party), and/or the right to petition (*e.g.*, by the exclusion of registered lobbyists).”<sup>182</sup>

The plaintiffs also claim the MCRC eligibility requirements violate the Equal Protection Clause of the Fourteenth Amendment.<sup>183</sup> The complaint states that the eligibility criteria are not narrowly tailored to the statute’s legitimate objectives of promoting transparency, fairness, or impartiality in the redistricting process.<sup>184</sup>

For example, the complaint argues that the restriction on lobbying unfairly distinguishes between registered lobbyists and those who may also petition the government but are not registered lobbyists.<sup>185</sup> “[These] exclusions penalize some individuals who engage in lobbying, but imposes no sanction at all on other individuals whose lobbying activities are much more extensive than those subject to the policy, including those who structure their time so as not to cross the registration thresholds.”<sup>186</sup>

Whether this case will give clarity on the constitutionality of restricting citizen members is unknown at this time. Some, if not all, of these eligibility restrictions appear in other states’ redistricting commission laws,<sup>187</sup> and will likely be up for debate in Virginia when drafting enabling legislation. If the legislature aims to establish criteria for citizen members of

<sup>179</sup> Complaint for Declaratory and Injunctive Relief at 3, *Daunt et. al. v. Benson*, No. 1:19-cv-00614 (W.D. Mich. July 30, 2019).

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 31.

<sup>182</sup> *Id.* at 18.

<sup>183</sup> *Id.* at 29.

<sup>184</sup> *Id.* at 30.

<sup>185</sup> *Id.* at 29–30.

<sup>186</sup> *Id.* at 30.

<sup>187</sup> *See, e.g.*, IDAHO CODE § 72-1502 (2019) (outlining restrictions for persons serving on state redistricting commission); *see also* WASH. REV. CODE § 44.05.050 (2019) (outlining restrictions for persons serving on state redistricting commission).

Virginia's redistricting commission, the General Assembly should carefully follow the outcome of the Michigan dispute.

### *B.Challenges to Redistricting Commission Maps*

Commissions, while generally seen as nonpartisan and a way to avoid gerrymandering, do not always equate to a "challenge proof" map.<sup>188</sup> Virginia should not expect a redistricting commission to totally impede any future legal challenges.<sup>189</sup>

For example, in 2011, a California Republican Congressman, George Radanovich, along with others, filed a petition arguing the California Redistricting Commission racially gerrymandered three congressional districts.<sup>190</sup> The case was ultimately dismissed.<sup>191</sup>

Further, various registered voters in New Jersey challenged the legislative apportionment map in 2011, claiming that the redistricting commission engaged in unlawful gerrymandering.<sup>192</sup> The voters brought ten challenges against the Commission's map, and alleged that the commission violated the Equal Protection Clause of the Fourteenth Amendment.<sup>193</sup> The case was dismissed.<sup>194</sup>

These two cases, while unsuccessful challenges, illustrate that redistricting commissions may be as vulnerable to legal challenges as maps created by the legislature.<sup>195</sup>

## IV. VIRGINIA'S POLITICAL CLIMATE AND SUPPORT FOR REDISTRICTING REFORM

In his dissent in *Bethune-Hill*, Justice Alito states, "Districting matters because it has institutional and legislative consequences."<sup>196</sup> As Virginia's next election approaches, the institutional and legislative

<sup>188</sup> See Alan Greenblatt, *Can Redistricting Ever Be Fair?*, GOVERNING (Nov. 2011), <https://www.governing.com/topics/politics/can-redistricting-ever-be-fair.html> (describing the challenges still seen in states with redistricting commissions) (arguing that even redistricting processes using independent commissions have implicit biases).

<sup>189</sup> See generally *Radanovich v. Bowen*, 2:11CV09786(SVW)(PJW), 2012 U.S. Dist. LEXIS 199349, at \*1 (C.D. Cal. Feb. 9, 2012) (exemplifying a challenge to California's redistricting process, even after the state used independent commissions).

<sup>190</sup> *Id.* at \*3.

<sup>191</sup> *Id.* at \*8.

<sup>192</sup> *Gonzalez v. State Apportionment Comm'n*, No. MER-L-1173-11, 2011 N.J. Super. Unpub. LEXIS 2366, at \*2 (N.J. Super. Law. Div. Aug. 31, 2011).

<sup>193</sup> *Id.* at \*14.

<sup>194</sup> *Id.* at \*89.

<sup>195</sup> See *Radanovich*, 2012 U.S. Dist. LEXIS 199349, at \*1-2; see also *Gonzalez*, 2011 N.J. Super. Unpub. LEXIS 2366, at \*2.

<sup>196</sup> *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1957 (2019) (Alito, J., dissenting).

consequences from the District Court's maps are unknown.<sup>197</sup> As discussed previously, the maps appear to favor Democrats in certain House districts that have historically favored Republicans, and the Republicans hold a vulnerable 21-19 majority in the Senate.<sup>198</sup> Republicans, fatigued from a long legal battle and understanding that the 2019 elections of all 140 seats in the legislature may result in a minority status in one or both chambers, are shifting to a more favorable position on redistricting reform.<sup>199</sup> If Republicans lose control of both chambers, they effectively lose any ability to influence the redistricting process.<sup>200</sup> A nonpartisan redistricting commission could allow them some control over the process (through appointees and transparent proceedings).<sup>201</sup> If the Republicans remain in control, it may still be advantageous to continue with a nonpartisan commission to avoid bearing the brunt of future legal challenges.<sup>202</sup> The same arguments apply to the Democrats. If the Republicans maintain their majority status after November, Democrats could have little influence over the redistricting decisions following the 2020 census. An independent redistricting commission guarantees the minority party a seat at the table. It is possible that the Republican will retain control over one chamber and the Democrats will lead the other.<sup>203</sup> Without a commission, we could see another period of political battles and partisan gerrymandering.<sup>204</sup> In 2011, Senator Richard Saslaw, who was the Majority Leader at the time, candidly stated:

Our goal is to make the Democratic districts, particularly the marginal ones, a little bit better than they are now. I'm not greedy. I'm not trying to put all the Republicans out of

<sup>197</sup> *Id.*

<sup>198</sup> *E.g.*, Schneider, *supra* note 40.

<sup>199</sup> See Graham Moomaw, *Va. House Republicans Advance Plan for Independent Redistricting Commission*, RICH. TIMES-DISPATCH (Jan. 28, 2019), [https://www.richmond.com/news/virginia/government-politics/general-assembly/va-house-republicans-advance-plan-for-independent-redistricting-commission/article\\_c6e814e2-4249-53e9-8e67-6b3470632f5.html](https://www.richmond.com/news/virginia/government-politics/general-assembly/va-house-republicans-advance-plan-for-independent-redistricting-commission/article_c6e814e2-4249-53e9-8e67-6b3470632f5.html) ("Cox said Monday that his thinking on redistricting reform has changed because of 'pretty aggressive' action federal courts have taken to redraw two Virginia electoral maps over the past decade in response to successful legal challenges from Democratic-aligned groups.").

<sup>200</sup> Jacob Fischler, *Gerrymandering in Mind, Parties Target State Legislative Races*, ROLL CALL (Jul. 31, 2019), <https://www.rollcall.com/news/campaigns/gerrymandering-in-mind-parties-target-state-legislative-races>.

<sup>201</sup> See *Redistricting Commissions: What Works*, BRENNAN CTR. FOR JUST. (July 24, 2018), <https://www.brennancenter.org/blog/redistricting-commissions-what-works> (recommending strong transparency requirements to make commission proceedings as accessible as possible).

<sup>202</sup> See Tony Pugh, *Supreme Court Gerrymandering Decision Signals More Legal Challenges to Come*, MCCLATCHY WASH. BUREAU (June 19, 2018), <https://www.mcclatchydc.com/news/nation-world/national/article213426084.html> (describing how Democrats plan to continue to bring legal challenges if Republicans continue to gerrymander or remain uncooperative).

<sup>203</sup> See Williams, *supra* note 2.

<sup>204</sup> See Pugh, *supra* note 202.

business by any stretch. They didn't do that to us 10 years ago. And we're not gonna do that to them.<sup>205</sup>

Seemingly, each chamber was able to draw districts that were most favorable to maintaining their incumbents.<sup>206</sup> However, even Senator Saslaw (and many other Virginia Democrats) now supports an independent redistricting Commission.<sup>207</sup>

Although both sides of the aisle appear to support a redistricting commission, this support could wane after the 2019 General Assembly elections. Should Democrats or Republicans hold the majority, maintaining the status quo would be advantageous to shaping electoral districts for the next decade. Despite political pressure for reform and the danger of legal challenges, retaining legislative control over redistricting has obvious appeal for the party in power.

Public support for a redistricting commission seems to be at an all-time high. Various media outlets have run articles touting that the time may be right for a shift to the commission.<sup>208</sup> The Washington Post even stated, "The status quo is unfair and unworkable."<sup>209</sup> The nonpartisan group One Virginia 2021 has spent years working with the legislature and offering model legislation for redistricting commissions.<sup>210</sup> The group is now working toward seeing the reform measure through the rest of the process.<sup>211</sup>

It is not just legislators and special interests groups who are in favor of a redistricting commission.<sup>212</sup> A 2018 poll from Virginia Commonwealth

<sup>205</sup> Thomas E. Mann & Norman J. Ornstein, *The Rigged Redistricting Process*, BROOKINGS (Mar. 18, 2011), <https://www.brookings.edu/opinions/the-rigged-redistricting-process/>.

<sup>206</sup> *See id.*

<sup>207</sup> Richard L. Saslaw & George L. Barker, *It's Past Time to Reset Virginia Voting. Here's How to do it Fairly*, WASH. POST (Mar. 8, 2019), [https://www.washingtonpost.com/opinions/local-opinions/its-past-time-to-reset-virginia-voting-heres-how-to-do-it-fairly/2019/03/08/0580af74-3ebe-11e9-922c-64d6b7840b82\\_story.html](https://www.washingtonpost.com/opinions/local-opinions/its-past-time-to-reset-virginia-voting-heres-how-to-do-it-fairly/2019/03/08/0580af74-3ebe-11e9-922c-64d6b7840b82_story.html).

<sup>208</sup> E.g. Marie Albiges & Reema Amin, *Virginia's Redistricting Argument Could Strengthen Push for Independent Map Drawers*, DAILY PRESS (Sept. 15, 2018), <https://www.dailypress.com/government/dpnws-redistricting-virginia-20180905-story.html>.

<sup>209</sup> Editorial Board, *Virginia is on the Cusp of Redistricting Reform. Lawmakers Must Get It Right.*, WASH. POST (Feb. 19, 2019), [https://www.washingtonpost.com/opinion/virginia-is-on-the-cusp-of-redistricting-reform-lawmakers-must-get-it-right/2019/02/19/3ad6f06c-3495-11e9-af5b-b51b7ff322e9\\_story.html](https://www.washingtonpost.com/opinion/virginia-is-on-the-cusp-of-redistricting-reform-lawmakers-must-get-it-right/2019/02/19/3ad6f06c-3495-11e9-af5b-b51b7ff322e9_story.html).

<sup>210</sup> *About Us*, ONEVIRGINIA2021, <https://www.onevirginia2021.org/about-us/> (last visited Sept. 14, 2019).

<sup>211</sup> *The Solution*, ONEVIRGINIA2021, <https://www.onevirginia2021.org/the-solution/> (last visited Aug. 29, 2019).

<sup>212</sup> VCU L. DOUGLAS WILDER SCH. OF GOV'T & PUB. AFFAIRS CTR. FOR PUB. POLICY, ONLY 16% OF VIRGINIANS WANT GENERAL ASSEMBLY IN CHARGE OF REDISTRICTING 13 (Aug. 8, 2018), [https://wilder.vcu.edu/media/wilder/documents/R1\\_Sum2018\\_Wilder\\_public\\_policy\\_poll\\_electionFINAL.pdf](https://wilder.vcu.edu/media/wilder/documents/R1_Sum2018_Wilder_public_policy_poll_electionFINAL.pdf).

2019]

PREPARING FOR THE NEXT DECADE

81

University showed that only sixteen percent of Virginians want the General Assembly to be in charge of redistricting in 2021.<sup>213</sup> In terms of alternatives, about twenty-four percent favored a panel of local and state experts, twenty percent favored a citizens' commission, and 18 percent were in favor of a bipartisan commission appointed by the governor.<sup>214</sup>

Another decade-long fight over legislature-drawn district maps could have institutional and legislative consequences, and could threaten public confidence in the legislature.<sup>215</sup> Virginia has the opportunity to build on lessons learned from other states and craft legislation that successfully enables the Commission to draw constitutional districts. With past failures in the legislature, a legal challenge lost at the Supreme Court, and unknown political future in Virginia, now might be the right time for redistricting reform in Virginia.

---

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *See* Va. House of Delegates v. Bethune-Hill, 139 S. Ct. 1945, 1957 (2019) (Alito, J., dissenting).



*“THC-YOU LATER!”\*: ANALYZING MARIJUANA PROSECUTIONS IN  
LIGHT OF THE FEDERAL FARM BILL*

*Jacqueline M. Cipolla\**

\* Michelle Butterfield, All the Ridiculous Pot Puns You’ll Need This Week, Canada, HUFFPOST (Oct. 16, 2018).

\* Jacqueline Cipolla is a J.D. Candidate in the Class of 2020 at the University of Richmond School of Law and is the Symposium Editor of the Public Interest Law Review. She originally is from Fairfax County, Virginia, and graduated from the University of Virginia in 2014. During the summer of 2019, she interned in the Richmond Commonwealth’s Attorney’s Office where she argued this issue of first impression as to the reliability of marijuana field test kits in distinguishing marijuana versus hemp in the General District Court. She would like to thank her Legislation & Regulation professor, Hayes Holdenness for all of his help with administrative law during the summer; her evidence professor, Corinna Lain for teaching that a “brick is not a wall;” and the Richmond Commonwealth’s Attorney’s Office for trusting this issue to an intern. She also would like to thank her family and her former employer, Ronald Smith, Esq., for all of their support. She will be clerking in the Fairfax County Circuit Court after graduation. She would like to dedicate this comment to her grandfather, Joseph Cipolla.



## ABSTRACT

*In 2014, Congress and other states passed legislation that legalized industrial hemp and excluded it from the definition of marijuana. As a result, hemp and CBD products became increasingly popular and began selling in stores and online. While most hemp and CBD products generally contain little to no THC, some of these products look almost identical to actual marijuana. Recently, the Virginia Department of Forensic Science issued a memorandum advising that the current marijuana field test kits that law enforcement agencies use to test green leafy plant material cannot distinguish between marijuana and industrial hemp. This comment will discuss the status of industrial hemp, hemp products, and marijuana in the United States and Virginia, and how the inability to distinguish between marijuana and industrial hemp will impact marijuana prosecutions going forward.*

## INTRODUCTION

The *Huffington Post* recently published an article, “Ohio Legislators Accidentally Legalize Pot, Say Law Enforcement Experts.”<sup>1</sup> The clickbait aside, *Huffington Post* is not entirely wrong. Ohio, along with other states and the federal government, recently passed a law excluding hemp from the definition of marijuana, thus legalizing industrial hemp and hemp products.<sup>2</sup> The Federal Farm Bill, originally passed in 2014, allows state institutions of higher education to grow industrial hemp as part of an industrial hemp research program.<sup>3</sup> Industrial hemp has a significantly lower concentration of tetrahydrocannabinol (THC) than marijuana does.<sup>4</sup> However, law enforcement agencies in Ohio cannot determine the quantity of THC in marijuana versus hemp.<sup>5</sup> This lack of quantitative analysis effectively stays any prosecution for possession of marijuana, or as one Ohio law enforcement officer bluntly stated, “You legalized marijuana in Ohio for [the] time being.”<sup>6</sup>

<sup>1</sup> Mary Papenfuss, *Ohio Legislators Accidentally Legalized Pot, Say Law Enforcement Experts*, HUFFPOST (Aug. 10, 2019), [https://www.huffpost.com/entry/ohio-marijuana-legal-accident-hemp\\_n\\_5d4e689de4b0fd2733f0b7df](https://www.huffpost.com/entry/ohio-marijuana-legal-accident-hemp_n_5d4e689de4b0fd2733f0b7df).

<sup>2</sup> *Id.*; VA. CODE § 18.2-247(D) (2019); *see also* 21 U.S.C. § 812(c)(17) (2019) (“Tetrahydrocannabinols” are classified as Schedule I, “except for tetrahydrocannabinols in hemp (as defined under section 297A of the Agricultural Marketing Act of 1946...)”).

<sup>3</sup> Alice Mead, *The Legal Status of Cannabis (Marijuana) and Cannabidiol (CBD) Under U.S. Law*, 70 J. EPILEPSY & BEHAV. 288, 290 (2017); *see also* COMMONWEALTH OF VA., DEP’T OF FORENSIC SCI., NOTICE REGARDING MARIJUANA FIELD TESTS AND CHANGES TO THE DEPARTMENT’S ANALYTICAL AND REPORTING SCHEME FOR MARIJUANA AND MARIJUANA BYPRODUCTS (2019) (advising that the 2018 Federal Farm Bill established a regulatory framework for agricultural production of industrial hemp and removed industrial from a Schedule I controlled substance).

<sup>4</sup> *See* Alice Mead, *The Legal Status of Cannabis (Marijuana) and Cannabidiol (CBD) Under U.S. Law*, 70 J. EPILEPSY & BEHAV. 288, 289–90 (2017); Papenfuss, *supra* note 1.

<sup>5</sup> Papenfuss, *supra* note 1.

<sup>6</sup> *Id.*

2019]

“THC-YOU LATER!”

85

Virginia has a similar issue surrounding the lack of quantitative analysis of THC in green leafy plant material.<sup>7</sup> Indeed, the director of the Department of Forensic Science (DFS) advised in a memorandum, “[t]he current marijuana field tests (Duquenois-Levine) approved by DFS are only capable of presumptively identifying *Cannabis sativa* plant material; thus, the current marijuana field tests cannot distinguish marijuana from industrial hemp.”<sup>8</sup> Since the marijuana field test kits used by various law enforcement agencies throughout the Commonwealth can only determine whether THC is present in green leafy plant material, and not the quantitative amount of THC present in the substance,<sup>9</sup> it begs the question whether Virginia, like Ohio, “accidentally” legalized marijuana.<sup>10</sup>

This comment will discuss the status of industrial hemp, hemp products, and marijuana in the United States and Virginia in light of Congressional enactment of the Farm Bill legalizing industrial hemp.<sup>11</sup> Part II will discuss marijuana and industrial hemp generally, including its chemical compounds, and crimes and penalties associated with possession. Part III will discuss the various field test kits law enforcement agencies use to determine whether a substance is marijuana and their inability to distinguish between marijuana and hemp, and how this will impact marijuana prosecutions going forward.

#### I. MARIJUANA V. HEMP

##### A. General and Chemical Characteristics

Both marijuana and industrial hemp are different strains of the *Cannabis sativa* plant containing approximately a hundred different types of cannabinoids, the most predominant of which are THC and cannabidiol (CBD).<sup>12</sup> When ingested, the cannabinoid THC activates the body’s endogenous

<sup>7</sup> See COMMONWEALTH OF VA., DEP’T OF FORENSIC SCI., NOTICE REGARDING MARIJUANA FIELD TESTS AND CHANGES TO THE DEPARTMENT’S ANALYTICAL AND REPORTING SCHEME FOR MARIJUANA AND MARIJUANA BYPRODUCTS (2019).

<sup>8</sup> *Id.*

<sup>9</sup> See *id.*; Description of *NARK II Duquenois-Levine Reagent (Marijuana/Hashish Hash-Oil/THC)*, SIRCHIE, [https://www.sirchie.com/nark-ii-duquenois-levine-reagent-marijuana-hashish-hash-oil-thc-10-tests.html#.XX\\_B3yhKg2w](https://www.sirchie.com/nark-ii-duquenois-levine-reagent-marijuana-hashish-hash-oil-thc-10-tests.html#.XX_B3yhKg2w) (last visited Jun. 29, 2019) (“NOTICE: NOT FOR USE WITH CBD OILS... this test should NOT BE USED [for testing hemp and CBD] as everything tested will be positive.”).

<sup>10</sup> See Papenfuss, *supra* note 1.

<sup>11</sup> See Alice Mead, *The Legal Status of Cannabis (Marijuana) and Cannabidiol (CBD) Under U.S. Law*, 70 J. EPILEPSY & BEHAV. 288, 289–90 (2017).

<sup>12</sup> *Id.* at 290; see also COMMONWEALTH OF VA., DEP’T OF FORENSIC SCI., *supra* note 7.

cannabinoid receptors, CB1 and CB2.<sup>13</sup> The CB1 receptor is found in the brain and central nervous system.<sup>14</sup> When THC activates the CB1 receptor, it creates a psychoactive effect or a high.<sup>15</sup> On the other hand, the cannabinoid CBD does not directly activate those CB1 and CB2 receptors and itself is not considered psychoactive.<sup>16</sup> Industrial hemp is generally low in cannabinoid content compared to marijuana.<sup>17</sup>

The Federal Farm Bill and similar state legislation technically does not legalize hemp, but instead excludes hemp from the definition of marijuana.<sup>18</sup> Indeed, the entire hemp plant with “roots in the ground” is considered marijuana under the Controlled Substances Act.<sup>19</sup> Generally, industrial hemp must have a THC concentration of less than .3% in order to be excluded from the definition of marijuana.<sup>20</sup> Additionally, some parts of the cannabis plant, including stalk, fiber, and seeds, are excluded from the definition of marijuana.<sup>21</sup> However, if CBD is extracted from any part of the cannabis plant, including the exempted parts, it still is considered marijuana under the definition.<sup>22</sup> This is an “exception to the exemption.”<sup>23</sup> CBD is an oily resin generally extracted from the flowering portion of the cannabis plant.<sup>24</sup> While they are different strains of the *Cannabis sativa* plant, marijuana and industrial hemp essentially are indistinguishable for legal purposes without a quantitative analysis of the THC concentration.<sup>25</sup>

## B. Marijuana Crimes and Penalties

### 1. Federal Treatment of Marijuana Crimes

Federally, marijuana is defined as “all parts of the plant *Cannabis sativa* L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative,

<sup>13</sup> Mohamed M. Radwan et al., *Isolation and Pharmacological Evaluation of Minor Cannabinoids from High Potency Cannabis Sativa*, 78 J. NAT. PRODUCTS, 1271 (2015); see also Alice Mead, *The Legal Status of Cannabis (Marijuana) and Cannabidiol (CBD) Under U.S. Law*, 70 J. EPILEPSY & BEHAVIOR 288, 290 (2017).

<sup>14</sup> Mohamed M. Radwan et al., *Isolation and Pharmacological Evaluation of Minor Cannabinoids from High Potency Cannabis Sativa*, 78 J. NAT. PRODUCTS, 1271, 1271 (2015).

<sup>15</sup> Mead, *supra* note 11, at 289.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 289–90.

<sup>19</sup> *Id.* at 290.

<sup>20</sup> *Id.*; see also 7 U.S.C.S. § 5940(a)(2) (2019); see also VA. CODE § 3.2-4112 (2019) (following federal law).

<sup>21</sup> Mead, *supra* note 11, at 289.

<sup>22</sup> *Id.* at 289–90.

<sup>23</sup> *Id.* at 290.

<sup>24</sup> *Id.*

<sup>25</sup> COMMONWEALTH OF VA., DEP’T OF FORENSIC SCI., *supra* note 7.

2019]

“THC-YOU LATER!”

87

mixture, or preparation of such plant, its seeds or resin.”<sup>26</sup> Industrial hemp is excluded from this definition.<sup>27</sup> Marijuana is classified as a Schedule I substance under the Controlled Substances Act.<sup>28</sup> Schedule I substances are so classified because they have a “high potential for abuse,” have “no currently accepted medical use in treatment,” and have a “lack of accepted safety for use of the drug.”<sup>29</sup> Both the Drug Enforcement Agency and the Food and Drug Administration have concluded that marijuana has a “high potential for abuse” and has “no currently accepted medical use.”<sup>30</sup> Additionally, any substance that is derived from a Schedule I substance is also classified as a Schedule I substance.<sup>31</sup> For example, CBD is not listed separately in Schedule I since it is a resin and is considered a derivative of marijuana.<sup>32</sup> On the other hand, THC is listed separately under Schedule I.<sup>33</sup>

The penalty for simple possession of marijuana is a maximum term of incarceration of one year and a fine of \$1,000.<sup>34</sup> For second offenses, the defendant must serve a minimum of fifteen days incarceration but not more than two years, and the fines increase to \$2,500.<sup>35</sup> The penalty for possession with intent to distribute or distribution of less than 50 kilograms of marijuana is a maximum term of incarceration of five years and a maximum fine of \$250,000.<sup>36</sup> If convicted of a first offense of distribution and sentenced to a term of imprisonment, the defendant will be sentenced to a period of supervised release for at least two years.<sup>37</sup> If the defendant has had a prior felony drug conviction, the maximum term of incarceration is ten years, and the defendant will be placed on supervised release for a period of at least four years.<sup>38</sup>

The Department of Justice issued a guidance memorandum to the various U.S. Attorneys’ offices regarding marijuana enforcement after some states, such as Washington and Colorado, legalized marijuana.<sup>39</sup> DOJ

---

<sup>26</sup> 21 U.S.C. § 802(16)(A) (2019).

<sup>27</sup> *Id.* § 802(16)(B)(i–ii).

<sup>28</sup> *Id.* § 812(c)(10) (listing Schedule I drugs).

<sup>29</sup> *Id.* § 812(b)(1)(A–C).

<sup>30</sup> Mead, *supra* note 11, at 291.

<sup>31</sup> *Id.* at 288; *see also* 21 U.S.C. § 802(16)(A).

<sup>32</sup> Mead, *supra* note 11, at 289; *see also* 21 U.S.C. § 802(16)(A) (2019); *see also* 21 U.S.C. § 812(c)(10) (2019).

<sup>33</sup> 21 U.S.C. § 812(c)(17) (2019) (listing Schedule I drugs).

<sup>34</sup> *Id.* § 844.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* § 841(b)(1)(D).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> U.S. DEP’T OF JUSTICE, GUIDANCE REGARDING MARIJUANA ENFORCEMENT 1 (2013); Aaron Smith, *Marijuana Legalization Passes in Colorado and Washington*, CNN BUS. (Nov. 8, 2012), <https://money.cnn.com/2012/11/07/news/economy/marijuana-legalization-washington-colorado/index.html>.

instructed the U.S. Attorneys' offices to enforce the Controlled Substances Act "when the use, possession, cultivation, or distribution of marijuana" has threatened federal policy goals, including the prevention of selling drugs to minors, gang violence, drug trafficking, and financial benefit from selling drugs to criminal enterprises.<sup>40</sup> The DOJ voiced concern that the states that legalized marijuana affect the "traditional joint federal-state approach to narcotics enforcement"<sup>41</sup> and declared these states "must provide the necessary resources and demonstrate the willingness to enforce their laws and regulations in a manner that ensures they do not undermine federal enforcement priorities."<sup>42</sup> Indeed, the DOJ asserted it will not alter its enforcement of federal marijuana laws, "regardless of state law."<sup>43</sup>

## 2. Similar Treatment of Marijuana Crimes in Virginia

The Virginia definition of marijuana is almost identical to the federal definition.<sup>44</sup> Marijuana is defined as "any part of a plant of the genus *Cannabis*, whether growing or not, its seeds or resin; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds, or its resin...."<sup>45</sup> This definition of marijuana also includes oily extracts if the extract "contains less than 12 percent of [THC] by weight...."<sup>46</sup> The "oily extract containing one or more cannabinoids" is marijuana if it is combined with "other parts of plants of the genus *Cannabis*."<sup>47</sup> Thus, "[a] substance is marijuana because it is a part of a cannabis plant, not because of the amount of THC it contains."<sup>48</sup>

Marijuana is unlawful in Virginia.<sup>49</sup> The maximum punishment for simple possession is 30 days in jail and a fine of \$500.<sup>50</sup> A defendant who is found guilty of a second or subsequent offense is guilty of a Class 1 misdemeanor.<sup>51</sup> The maximum punishment for a conviction of a Class 1 misdemeanor is twelve months in jail and a \$2,500 fine.<sup>52</sup> However, Virginia does have a statute for first time drug offenders, in which the court determines facts are sufficient to find the defendant guilty, but withholds a finding of

<sup>40</sup> U.S. DEP'T OF JUSTICE, GUIDANCE REGARDING MARIJUANA ENFORCEMENT 1, 2 (2013).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 1, 2–3.

<sup>43</sup> *Id.*

<sup>44</sup> Compare VA. CODE. § 18.2-247(D) (2019), with 21 U.S.C. § 802(16)(A) (2019).

<sup>45</sup> VA. CODE. § 18.2-247(D) (2019).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Howard v. Commonwealth, 437 S.E.2d 420, 423 (Va. Ct. App. 1993).

<sup>49</sup> VA. CODE § 18.2-250.1 (2019).

<sup>50</sup> *Id.* § 18.2-250.1(A).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* § 18.2-11(a).

2019]

“THC-YOU LATER!”

89

guilt, and places the defendant on probation.<sup>53</sup> As a condition of probation, the defendant must agree:

(a) to successfully complete treatment or education program or services, (b) to remain drug and alcohol free during the period of probation and submit to such tests during that period as may be necessary and appropriate to determine if the accused is drug and alcohol free, (c) to make reasonable efforts to secure and maintain employment, and (d) to comply with a plan of at least 100 hours of community service for a felony and up to 24 hours of community service for a misdemeanor.<sup>54</sup>

Additionally, if a defendant were placed on supervised probation and violated the terms and condition of his probation by testing positive for marijuana, a positive urine screen for marijuana would not incur any additional points on the probation violation sentencing guidelines.<sup>55</sup>

One recent controversy surrounding marijuana prosecutions occurred in Norfolk, Virginia.<sup>56</sup> In March 2019, the Commonwealth’s Attorney for the City of Norfolk sent a letter to the Chief Judge of the Norfolk Circuit Court, announcing his office “would undertake several efforts to achieve what he called criminal justice reform”<sup>57</sup> and would “cease prosecuting cases” appealed from the general district court which the “sole charge” is misdemeanor possession of marijuana.<sup>58</sup> The Commonwealth justified this policy in promoting the “interest of fair and efficient administration of justice,”<sup>59</sup> citing the racial disparities in arrests for misdemeanor possession of marijuana.<sup>60</sup> Indeed, of the 1,560 defendants charged with misdemeanor possession of marijuana in Norfolk, 81% of those defendants were black.<sup>61</sup> The Commonwealth argued that prosecuting these simple possession of marijuana offenses “breeds a reluctance on the part of African Americans, particularly young African American men, to trust or cooperate with the justice system,” and “also encourages the perception that the justice system is not focusing its

<sup>53</sup> VA. CODE § 18.2-251 (2019).

<sup>54</sup> *Id.*

<sup>55</sup> SENTENCING REVOCATION REPORT AND PROBATION VIOLATION GUIDELINES 14 (VA. CRIMINAL SENTENCING COMM’N 2018).

<sup>56</sup> Jonathan Edwards, *Norfolk’s Top Prosecutor Says He’s Taking Fight Over Pot Cases to State Supreme Court*, DAILY PRESS (Mar. 4, 2019), <https://www.dailypress.com/news/crime/dp-nws-norfolk-pot-supreme-court-20190304-story.html>.

<sup>57</sup> *Id.*

<sup>58</sup> Letter from Gregory Underwood, Commonwealth Attorney, to Jerrauld C. Jones, Chief Judge, Norfolk Circuit Court, and George E. Schaefer, III, Clerk, Norfolk Circuit Court (Mar. 1, 2019).

<sup>59</sup> *Id.*

<sup>60</sup> Edwards, *supra* note 56.

<sup>61</sup> *Id.*

attention on the legitimately dangerous crimes that regrettably are concentrated in these same communities.”<sup>62</sup>

The Commonwealth’s decision to cease prosecuting marijuana offenses was met with some apprehension on the part of the judiciary.<sup>63</sup> Judge Hall of the Norfolk Circuit Court told the Commonwealth at the hearing, “I believe this is an attempt to usurp the power of the state legislature,” and “[t]his is a decision that must be made by the General Assembly, not by the [C]ommonwealth’s [A]ttorney’s office.”<sup>64</sup> As a result, the Circuit Court denied the Commonwealth’s motions to *nolle prosequi* the possession of marijuana charges on appeal.<sup>65</sup> The Commonwealth then sought a writ of mandamus from the Virginia Supreme Court ordering the Circuit Court to grant the motions to *nolle prosequi* and to resolve the “collective” disagreement between the Commonwealth and the Circuit Court.<sup>66</sup>

The Virginia Supreme Court denied the Commonwealth’s petition for a writ of mandamus.<sup>67</sup> The Court concluded, a circuit court’s decision whether to accept or to deny the Commonwealth’s motion to *nolle prosequi* is an “exercise of [its] judgment or discretion” and thus “cannot be compelled by mandamus.”<sup>68</sup> Additionally, the Virginia Supreme Court held the Commonwealth does not have an “unrestricted ability to dismiss a criminal charge” and must obtain “judicial consent” to *nolle prosequi* a charge after a showing of good cause.<sup>69</sup>

### C. Effects of the Farm Bill and Industrial Hemp Legalization

#### 1. Federal Treatment of Industrial Hemp

Congress enacted the Farm Bill in 2014, which authorizes state higher education institutions or state departments of agriculture to grow industrial hemp as part of an “agricultural pilot” or research program.<sup>70</sup> The statute defines industrial hemp as “the plant *Cannabis sativa* L. and any part of such plant,

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *In re Underwood*, No. 190497, slip op. at 1 (Va. May 2, 2019).

<sup>66</sup> See Ned Oliver, *Virginia Explained: Can a Local Prosecutor Decide to Just Stop Prosecuting Marijuana Cases? The Va. Supreme Court Will Decide*, VA. MERCURY (Apr. 22, 2019), <https://www.virginiamercury.com/2019/04/22/can-a-local-prosecutor-decide-to-just-stop-prosecuting-marijuana-cases-the-va-supreme-court-will-decide/>.

<sup>67</sup> *In re Underwood*, slip op. at 1.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 4 (Va. May 2, 2019); see also VA. CODE § 19.2-265.3 (“Nolle prosequi shall be entered only in the discretion of the court, upon motion of the Commonwealth with good cause therefor shown.”); *Roe v. Commonwealth*, 628 S.E.2d 526, 529 (Va. 2006) (“A *nolle prosequi* and a motion to dismiss are separate and distinct procedures.”).

<sup>70</sup> Mead, *supra* note 11, at 290.

2019]

“THC-YOU LATER!”

91

whether growing or not, with a delta-9 [THC] concentration of not more than 0.3 percent on a dry weight basis.”<sup>71</sup> An “agricultural pilot program” is defined as a “pilot program to study the growth, cultivation, or marketing of industrial hemp...” so long as state law permits this type of program to exist.<sup>72</sup> Additionally, industrial hemp must be cultivated “exclusively for industrial purposes,” which involves the hemp seed and fiber, but not the “flowering tops.”<sup>73</sup> Hemp is generally grown for its seeds and fiber, and to absorb heavy metals and chemical waste from soil.<sup>74</sup> Hemp seeds can also be used in human foods, such as breads and protein powders, since they are a good source of protein and omega fatty acids.<sup>75</sup>

One issue with the 2014 Farm Bill was the “extent to which growth by private parties and sale of industrial hemp products [were] permissible.”<sup>76</sup> Indeed, some states had interpreted the Farm Bill “as authorizing them to license independent, private cultivators who grow hemp, extract the CBD,” and then sell those products.<sup>77</sup> However, the U.S. Department of Agriculture, the Department of Health and Human Services, and the Drug Enforcement Agency issued a joint report advising the Farm Bill did not remove industrial hemp from Schedule I in the Controlled Substances Act,<sup>78</sup> and industrial hemp only can be grown if part of a state higher institution or state department of agriculture research program.<sup>79</sup> The DEA and FDA also sent out warning letters to online CBD vendors, whose websites claimed their CBD products had medicinal and healing properties but whose products actually contained higher concentrations of THC than advertised.<sup>80</sup> Additionally, since CBD still is a Schedule I controlled substance,<sup>81</sup> it would follow that any “overt marketing” of CBD in products is likely a violation of federal law, even if this type of marketing were not a violation of state law.<sup>82</sup>

## 2. Treatment of Industrial Hemp in Virginia

<sup>71</sup> 7 U.S.C. § 5940(a)(2) (2019).

<sup>72</sup> *Id.* § 5940(a)(1)(A).

<sup>73</sup> Mead, *supra* note 11, at 290.

<sup>74</sup> *Id.* at 289–90.

<sup>75</sup> *Id.* at 290.

<sup>76</sup> Statement of Principles on Industrial Hemp, 81 Fed. Reg. 53,395, 53,395 (Aug. 12, 2016).

<sup>77</sup> Mead, *supra* note 11, at 290.

<sup>78</sup> The current statute excludes THC in hemp from Schedule I. 21 U.S.C. § 812(c)(17) (2019) (“Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation, which contains any quantity of the following hallucinogenic substances, or which contains any of their salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation: tetrahydrocannabinols, except for tetrahydrocannabinols in hemp.”).

<sup>79</sup> Statement of Principles on Industrial Hemp, 81 Fed. Reg. 53,395, 53,395 (Aug. 12, 2016); *see also* Mead, *supra* note 11, at 290.

<sup>80</sup> *See Warning Letters and Test Results for Cannabidiol Related Products*, U.S. FOOD & DRUG ADMIN. (Jul. 24, 2019), <https://www.fda.gov/news-events/public-health-focus/warning-letters-and-test-results-cannabidiol-related-products>; *see also* Mead, *supra* note 11, at 290.

<sup>81</sup> 21 U.S.C. § 802(16)(A) (2019); *see also* Mead, *supra* note 11, at 289.

<sup>82</sup> Mead, *supra* note 11, at 290.



In Virginia, industrial hemp is defined as “any part of the plant *Cannabis sativa*... with a concentration of tetrahydrocannabinol that is no greater than that allowed by federal law.”<sup>83</sup> “Federal law” presumably means a THC concentration of less than .3%.<sup>84</sup> If a registered grower, dealer, or processor possesses industrial hemp, then industrial hemp is excluded from the definition of marijuana.<sup>85</sup> The Commissioner of the Department of Agricultural and Consumer Services has established a registration program to allow individuals to grow or process industrial hemp in a controlled fashion solely as part of an industrial hemp research program.<sup>86</sup> To become a registered grower, dealer, or processor, applicants must complete an application form through the Virginia Department of Agricultural and Consumer Services, and pay a \$50 registration fee.<sup>87</sup> State universities, including the University of Virginia, James Madison University, and Virginia Tech, all have industrial hemp research programs studying hemp growth in different climates across the Commonwealth, growth in different types of soil, and engineering for uses for industrial hemp.<sup>88</sup>

It is important to note that only a registered grower, dealer, or processor may grow and possess industrial hemp for “any lawful purpose.”<sup>89</sup> If anyone other than a registered grower dealer or processor were to possess industrial hemp, that person would be possessing marijuana under the definition, and would thus be subject to the penalties associated with that offense.<sup>90</sup>

However, possession of industrial hemp by a registered grower, dealer, and processor is an affirmative defense to a charge of possession of marijuana, and the burden of proof shifts to the defendant to show he or she is a registered grower, dealer, or processor in lawful possession of the industrial hemp.<sup>91</sup> Similarly, CBD also is considered marijuana if the oil contained less than 12% THC by weight.<sup>92</sup> However, a “practitioner in the course of his professional practice may issue a written certification for the use of [CBD]

<sup>83</sup> VA. CODE § 3.2-4112 (2019); *see also* 7 U.S.C. § 5940(a)(2) (2019).

<sup>84</sup> 7 U.S.C. § 5940(a)(2) (2019).

<sup>85</sup> VA. CODE § 18.2-247(D)(i) (2019); VA. CODE § 3.2-4115 (2019).

<sup>86</sup> VA. CODE § 3.2-4115(A) (2019).

<sup>87</sup> *Industrial Hemp*, VA. DEP’T AGRIC. & CONSUMER SERVICES, <https://www.vdacs.virginia.gov/plant-industry-services-hemp.shtml> (last visited Sept. 16, 2019).

<sup>88</sup> *Id.*

<sup>89</sup> VA. CODE § 3.2-4113(A) (2019).

<sup>90</sup> *Id.*; *see also* COMMONWEALTH OF VA., DEP’T OF FORENSIC SCI., *supra* note 7 (“[R]aw industrial hemp plant material is considered marijuana... *unless* it is ‘possessed by a person registered pursuant to subsection A of 3.2-4115...’”).

<sup>91</sup> VA. CODE § 3.2-4113(A) (2019).

<sup>92</sup> *Id.* § 18.2-247(D) (“Marijuana shall not include any oily extract containing one or more cannabinoids unless such extract contains less than 12 percent of tetrahydrocannabinol by weight...”).

2019]

“THC-YOU LATER!”

93

oil or THC-A oil” for medical treatment.<sup>93</sup> Possession of CBD oil or THC-A oil with a valid certification also is an affirmative defense to the charge of possession of marijuana with the burden of proof shifting to the defendant.<sup>94</sup> To assert this affirmative defense, the defendant must file the “valid written certification with the court at least 10 days prior to trial” and file a copy with the Commonwealth.<sup>95</sup> This written certification “shall be prima facie evidence that such oil was possessed pursuant to a valid written certification.”<sup>96</sup>

Additionally, “hemp products” also are excluded from the definition of marijuana if the THC concentration is not greater than .3%.<sup>97</sup> Hemp products are converted from industrial hemp to a finished hemp product, such as “rope, building materials, automobile parts, animal bedding, animal feed, cosmetics, oil containing an industrial hemp extract, or food or food additives for human consumption.”<sup>98</sup> For example, “Your CBD Store” in Richmond, Virginia advertises its hemp products, oils, and edible gummies online.<sup>99</sup> It also publishes the certificates of analysis of its products; one of the oils had a CBD concentration of .876%, and no THC was detected in the product.<sup>100</sup>

## II. MARIJUANA FIELD TEST KITS IN MARIJUANA PROSECUTIONS

### A. *General Characteristics of the Field Test Kit*

In Virginia, the Department of Forensic Science (DFS) is an independent administrative agency within the executive branch,<sup>101</sup> and thus must enact any regulation pursuant to the Virginia Administrative Process Act.<sup>102</sup> The General Assembly tasked DFS with the duty to “provide forensic laboratory services” to law enforcement and state agencies in the Commonwealth,<sup>103</sup> and also delegated DFS the authority to determine which field test kits can be used in prosecutions for possession of marijuana.<sup>104</sup>

<sup>93</sup> *Id.* § 54.1-3408.3(B); *see also id.* § 18.2-250.1(C) (creating an affirmative defense for such situations).

<sup>94</sup> VA. CODE § 18.2-250.1(C) (2019).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* § 18.2-247(D)(ii); *id.* § 3.2-4112.

<sup>98</sup> VA. CODE § 3.2-4112 (2019).

<sup>99</sup> *See generally* YOUR CBD STORE, <https://cbdrx4u.com/> (last visited Aug. 28, 2019).

<sup>100</sup> GREEN SCI. LABS, CERTIFICATE OF ANALYSIS NO. 071919BSTC 250, CANNABINOIDS TEST (Jul. 29, 2019), <https://cbdrx4u.com/lab-reports/lab-reports/071919bstc-250-pdf>.

<sup>101</sup> VA. CODE § 2.2-600 (2019); *Virginia Department of Forensic Science: History*, VIRGINIA.GOV, <https://www.dfs.virginia.gov/about-dfs> (last visited Sept. 30, 2019).

<sup>102</sup> *See* VA. CODE § 2.2-4007.01(A) (2019) (“In the case of all regulations... an agency shall (i) provide the Registrar of Regulations with a Notice of Intended Regulatory Action that describes the subject matter and intent of the planned regulation and (ii) allow at least 30 days for public comment...”).

<sup>103</sup> VA. CODE § 9.1-1101(B) (2019).

<sup>104</sup> *Id.* § 9.1-1110(A)(1).

The current list of DFS-approved marijuana field test kits is published in the Virginia Registrar of Regulations.<sup>105</sup> The Duquenois-Levine field tests are the kits DFS has approved for law-enforcement agencies to use throughout the Commonwealth.<sup>106</sup> Specifically, law enforcement agencies are generally equipped with the NARK II Duquenois-Levine field test kit.<sup>107</sup> If THC is present in the green leafy plant material being tested, then the field test chemicals will change to a “gray purplish blue” color.<sup>108</sup> However, lawful substances, such as mace and nutmeg, will also turn a sort of purple color,<sup>109</sup> potentially causing some sort of interference in some of the field tests kits.<sup>110</sup>

The Duquenois-Levine field test kits cannot distinguish between marijuana and industrial hemp because the field test is a “qualitative test” and is not a “quantitative” test.<sup>111</sup> For example, the NARK II Duquenois-Levine field test cannot “distinguish between 3% or 20% THC,” rather the NARK II can only establish that “presumptively, THC is present.”<sup>112</sup> The manufacturer’s website even states, “NOTICE: NOT FOR USE WITH CBD OILS... this test should NOT BE USED [for testing hemp and CBD] as everything tested will be positive.”<sup>113</sup> It follows, a hemp product lawfully containing less than .3% THC would test positive on the NARK II field test kit, since the kit only tests for the presence of THC.<sup>114</sup>

DFS is in the process of approving a new quantitative field test that could distinguish marijuana from industrial hemp and hemp products.<sup>115</sup> In order for DFS to approve a new marijuana field test, “the marijuana field test must correctly and consistently react in a clearly observable fashion to the

<sup>105</sup> 33 Va. Reg. Regs. 2854 (Aug. 7, 2017).

<sup>106</sup> 6 VA. ADMIN. CODE § 40-50-10 (2019); *see also* 6 VA. ADMIN. CODE § 40-50-60 (2019) (“[T]he department will periodically publish a list of approved marijuana field tests in the General Notices section of the Virginia Register of Regulations.”).

<sup>107</sup> 33 Va. Reg. Regs. 2854 (Aug. 7, 2017); *see also* Jodie Fleischer, *Virginia Buys New Test to Distinguish Marijuana From CBD*, NBC-4 WASH. (Jul. 31, 2019), [https://www.nbcwashington.com/on-air/as-seen-on/Virginia-Buys-New-Test-to-Distinguish-Between-CBD\\_-Marijuana\\_Washington-DC-513464772.html](https://www.nbcwashington.com/on-air/as-seen-on/Virginia-Buys-New-Test-to-Distinguish-Between-CBD_-Marijuana_Washington-DC-513464772.html).

<sup>108</sup> NAT’L INST. JUST., U.S. DEP’T OF JUST., COLOR TEST REAGENTS/KITS FOR PRELIMINARY IDENTIFICATION OF DRUGS OF ABUSE 3 (2000).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 11.

<sup>111</sup> Description of *NARK II Duquenois-Levine Reagent (Marijuana/Hashish Hash-Oil/THC)*, SIRCHIE, [https://www.sirchie.com/nark-ii-duquenois-levine-reagent-marijuana-hashish-hash-oil-thc-10-tests.html#\\_XX\\_B3yhKg2w](https://www.sirchie.com/nark-ii-duquenois-levine-reagent-marijuana-hashish-hash-oil-thc-10-tests.html#_XX_B3yhKg2w) (last visited Jun. 29, 2019).

<sup>112</sup> COMMONWEALTH OF VA., DEP’T OF FORENSIC SCI., *supra* note 7 (“The current marijuana field tests (Duquenois-Levine) approved by DFS are only capable of presumptively identifying *Cannabis sativa* plant material; thus, the current marijuana field tests cannot distinguish marijuana from industrial hemp.”); *id.*

<sup>113</sup> Description of *NARK II Duquenois-Levine Reagent (Marijuana/Hashish Hash-Oil/THC)*, *supra* note 111.

<sup>114</sup> COMMONWEALTH OF VA., DEP’T OF FORENSIC SCI., *supra* note 7.

<sup>115</sup> *Id.*

2019]

“THC-YOU LATER!”

95

naked eye, and perform in accordance with manufacturer’s instructions and claims.”<sup>116</sup> However, DFS must approve any new marijuana field test kit before it can be used at trial for possession of marijuana.<sup>117</sup>

Currently, DFS itself also cannot do a quantitative analysis of green leafy plant material at its laboratories.<sup>118</sup> DFS will implement a “semi-quantitative” analysis of plant material that will indicate if the THC concentration is greater than 1%.<sup>119</sup> DFS does, however, have a quantitative analysis for detecting the amount of THC in oils and vape pens.<sup>120</sup> For example, if the THC concentration is greater than 12%, then DFS will report the substance as hashish oil,<sup>121</sup> which is a Schedule I substance in Virginia,<sup>122</sup> possession of which is a felony.<sup>123</sup> If the THC concentration of the oil is less than 12%, then DFS will report the substance as marijuana.<sup>124</sup>

### *B. Field Test Kit Use in Marijuana Prosecutions*

In trials for possession of marijuana, Virginia Code § 19.2-188.1(B) permits the Commonwealth to elicit testimony from police officers regarding the results of a DFS-approved marijuana field test kit to prove a substance is marijuana.<sup>125</sup> This testimony reduces the burden on DFS in analyzing controlled substances.<sup>126</sup> The Commonwealth must give written notice of her intent to use the results of the field kit at trial to the defendant prior to trial.<sup>127</sup> The defendant may then request the plant material be submitted to DFS for a full chemical analysis.<sup>128</sup> Additionally, at trial, the Commonwealth must establish that DFS approved the field test kit as accurate and reliable.<sup>129</sup>

### *C. Effect on Marijuana Prosecutions*

Since the field test kit cannot distinguish between marijuana and industrial hemp, prosecutors in Virginia may have a difficult time proving

<sup>116</sup> 6 VA. ADMIN. CODE § 40-50-30(E) (2019).

<sup>117</sup> *Id.* § 40-50-50 (“Any modified marijuana field test must be approved before it can be used in accordance with § 19.2-188.1 of the Code of Virginia. These changes shall include, but are not limited to, any chemical, procedural or instructional modifications made to the marijuana field test.”).

<sup>118</sup> COMMONWEALTH OF VA., DEP’T OF FORENSIC SCI., *supra* note 7.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> VA. CODE § 54.1-3446(3) (2019).

<sup>123</sup> *Id.* § 18.2-250(A)(a).

<sup>124</sup> COMMONWEALTH OF VA., DEP’T OF FORENSIC SCI., *supra* note 7.

<sup>125</sup> VA. CODE § 19.2-188.1(B) (2019).

<sup>126</sup> Marla G. Decker & Stephen R. McCullough, *Annual Survey of Virginia Law: Criminal Law and Procedure*, 41 U. RICH. L. REV. 83, 118 (2006).

<sup>127</sup> VA. CODE § 19.2-188.1(B) (2019).

<sup>128</sup> *Id.*

<sup>129</sup> *See Galbraith v. Commonwealth*, 446 S.E.2d 633, 637 (Va. Ct. App. 1994).

charges of possession of marijuana beyond a reasonable doubt.<sup>130</sup> This is especially true if a defendant were to possess what is known as a “CBD flower.”<sup>131</sup> Indeed, the “CBD flower” looks almost identical to marijuana.<sup>132</sup> One solution to this problem would be for law enforcement agencies to submit every green leafy plant material they seize from defendants to the Department of Forensic Science for a quantitative analysis to determine the THC concentration. But again, DFS itself cannot do a quantitative analysis of the plant material until it implements the semi-quantitative test.<sup>133</sup> DFS also is overburdened with testing substances generally, with a turnaround time of 125 days for narcotics analysis.<sup>134</sup> The whole purpose of permitting prosecutors to use the marijuana field test results at trials for possession of marijuana is to reduce the DFS back-log.<sup>135</sup>

### CONCLUSION

Unless prosecutors are able to exclude the hypothesis of innocence—that the green leafy plant material an officer seized from a defendant is not a hemp product—then the Commonwealth will likely not be able to prove beyond a reasonable doubt the plant material is marijuana using results of the field test kit alone, since the field test kit cannot distinguish between marijuana and hemp.<sup>136</sup> If the Commonwealth still wishes to prosecute simple possession of marijuana offenses, then the Commonwealth’s Attorneys should send the plant material to DFS for a quantitative analysis, once DFS has implemented the semi-quantitative test. But, until DFS implements the semi-quantitative test, the General Assembly effectively has stayed any sort of marijuana prosecution in the Commonwealth; and, like Ohio, has “accidentally legalized”<sup>137</sup> marijuana in Virginia for the time being.

<sup>130</sup> See COMMONWEALTH OF VA., DEP’T OF FORENSIC SCI., *supra* note 7.

<sup>131</sup> See generally *CBD Hemp Flower – What Is It, Where to Buy & Legality*, INDUSTRIAL HEMP FARMS, <https://industrialhempfarms.com/cbd-hemp-flower/> (last visited Sept. 28, 2019) (“[T]he [CBD] flower is where the largest concentration [of cannabinoids] is found . . . . CBD hemp flower refers to the flower on the female hemp plant.”); TWEEDLE FARMS, <https://tweedlel farms.com/collections/all-products> (last visited Aug. 28, 2019) (photographs of CBD flowers).

<sup>132</sup> See TWEEDLE FARMS, <https://tweedlel farms.com/collections/all-products> (last visited Aug. 28, 2019).

<sup>133</sup> COMMONWEALTH OF VA., DEP’T OF FORENSIC SCI., *supra* note 7.

<sup>134</sup> *Average Case Turnaround Times*, VA. DEP’T FORENSIC SCI., <https://www.dfs.virginia.gov/about-dfs/current-turnaround-times/> (last updated Sept. 10, 2019).

<sup>135</sup> Decker & McCullough, *supra* note 126, at 116.

<sup>136</sup> See COMMONWEALTH OF VA., DEP’T OF FORENSIC SCI., *supra* note 7 (discussing the inability of current field tests to detect differences between marijuana and industrial hemp).

<sup>137</sup> Papenfuss, *supra* note 1.